116

No. 08- (1)

Supreme Court, U.S.
FILED

08-862 JAN 6 - 2009

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES (AFL-CIO)),

Petitioner,

v.

ELIZABETH PICHLER, RUSSELL CHRISTIAN, SETH NYE, HOLLY MARSTON, KEVIN QUINN, JOSE SABASTRO, THOMAS RILEY, AMY RILEY, and RUSSELL DAUBERT, on behalf of themselves and those similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE T. HOYLE, JR.
Counsel of Record
ARLENE FICKLER
ARLEIGH P. HELFER III
JOHN R. TIMMER
HOYLE, FICKLER, HERSCHEL & MATHES LLP
One South Broad Street
Suite 1500
Philadelphia, PA 19107
(215) 981-5700

Attorneys for Petitioner UNITE

220304

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whereas the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (1994) (the "DPPA") allows a person to use motor vehicle records information ("MVR information") for any of fourteen permitted purposes but imposes both civil and criminal liability on a person who "knowingly" uses MVR information "for a purpose not permitted,"

1. Does a party who obtains MVR information for two purposes – a DPPA permitted purpose and a purpose not permitted by the DPPA but otherwise legal – violate the DPPA?

2. Does the permitted use in connection with litigation set forth at 18 U.S.C. § 2721(b)(4), which includes an "investigation in anticipation of litigation," require that the MVR information be of use to the decision-maker in the litigation or is the permitted use satisfied by a person's use of the information to investigate contemplated or pending litigation?

3. Is a defendant civilly liable for "knowingly" violating the DPPA when it obtained MVR information without an appreciation that such conduct was wrongful?

4. Is a plaintiff who has neither pled nor suffered any harm or injury as a result of the alleged statutory violation entitled to an award of $2,500 under the DPPA's remedies provision that allows for an award of "actual damages, but not less than liquidated damages in the amount of $2,500"?

RULES 14.1 AND 29.6 STATEMENT

The petitioner states that it has no parent corporation and that no publicly held corporation holds its stock.

The respondents' attorneys' fees are being paid by Cintas Corporation, a corporation whose stock is publicly traded.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULES 14.1 AND 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	viii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	11
A. THE COURT SHOULD GRANT THIS PETITION TO RESOLVE THE INCONSISTENCY BETWEEN THE THIRD CIRCUIT'S INTERPRETATION OF THE DPPA AND INSTRUCTIVE PRECEDENTS OF THIS COURT.	13

Contents

Page

1. The Third Circuit's "Dual Purpose" Holding Conflicts With This Court's Analysis of Mixed Motive Cases and Fails to Resolve the Conflict in the Interpretation of the DPPA's Litigation Exception Between the District Court and the Eleventh Circuit. 13

   a. The Third Circuit's determination that a party who obtains MVR information for two purposes, one of which is not permitted by the DPPA, is necessarily liable for violating the Act conflicts with this Court's analysis in mixed motive cases. 13

   b. Any conclusion that UNITE did not have a permitted purpose is based on the district court's overly restrictive interpretation of the DPPA's permitted use for litigation which conflicts with the Eleventh Circuit's holding in *Thomas*. 19

Contents

Page

2. The Third Circuit's Conclusion That the Term "Knowingly" Means Something Different in the Criminal and Civil Liability Sections of the DPPA Contravenes This Court's Prior Decisions. 23

3. The Third Circuit's Interpretation of the DPPA's Remedies Provision As Entitling Each Prevailing Plaintiff to $2,500, Regardless of Whether or Not He or She Suffered Any Actual Damages, Conflicts With This Court's Statutory Construction Principles and Its Decisions in *Doe v. Chao* and *Priebe & Sons v. United States*. 27

B. THIS PETITION PRESENTS IMPORTANT LEGAL QUESTIONS CONCERNING THE CIVIL LIABILITY PROVISIONS OF A FEDERAL STATUTE THAT HAS UNEXPECTEDLY BROAD RAMIFICATIONS AND ENORMOUS POTENTIAL LIABILITY. 33

CONCLUSION 38

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Filed September 9, 2008 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of Pennsylvania Dated October 17, 2006 ..... 51a

Appendix C — Memorandum And Order Of The United States District Court For The Eastern District Of Pennsylvania Dated August 30, 2006 ..... 72a

Appendix D — Memorandum And Order Of The United States District Court For The Eastern District Of Pennsylvania Dated May 31, 2005 ..... 119a

Appendix E — Memorandum And Order Of The United States District Court For The Eastern District Of Pennsylvania Dated October 13, 2004 ..... 198a

Appendices

Page

Appendix F — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Filed October 8, 2008 ..... 208a

Appendix G — U.S. Code, Title 18, Chapter 123 – Prohibition On Release And Use Of Certain Personal Information From State Motor Vehicle Records 210a

TABLE OF CITED AUTHORITIES

Page

Cases

Amaral v. Cintas Corp.,
Case No. HG03103046
(Cal. Super. Ct. 2003) 6

Army & Air Force Exchange Service v. Sheehan,
456 U.S. 728 (1982) 12

Ayon v. Cintas Corp.,
Case No. BC310696 (Cal. Super. Ct. 2004) ... 6

BedRoc Ltd. v. United States,
541 U.S. 176 (2004) 29

Colonial at Lynnfield, Inc. v. Sloan,
870 F.2d 761 (1st Cir. 1989) 30

Commissioner of Internal Revenue
v. Groetzinger, 480 U.S. 23 (1987) 17

Commissioner of Internal Revenue v. Lundy,
516 U.S. 235 (1996) 24, 26

Cowart v. Nicklos Drilling Co.,
505 U.S. 469 (1992) 24

Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 17

Cited Authorities

Page

Doe v. Chao,
540 U.S. 614 (2004) ..... *passim*

Fidelity Federal Bank & Trust v. Kehoe,
547 U.S. 1051 (2006) 12, 36, 37

Finkle v. Gulf & Western Manufacturing Co.,
744 F.2d 1015 (3d Cir. 1984) 31

Gattis v. Snyder,
278 F.3d 222 (3d Cir. 2002) 17

Hartman v. Department of Conservation & Natural Resources,
892 A.2d 897 (Pa. Commw. Ct. 2006) 18, 34-35

Howard v. Senkowski,
986 F.2d 24 (2d Cir. 1993) 17

Hubbard Business Plaza v. Lincoln Liberty Life Ins. Co.,
No. 87-1573, 1988 WL 31909
(9th Cir. April 4, 1988) 31

Hutzler Bros. Co. v. NLRB,
630 F.2d 1012 (4th Cir. 1980) 5

Kehoe v. Fidelity Federal Bank & Trust,
421 F.3d 1209 (11th Cir. 2005), *cert. denied*,
547 U.S. 1051 (2006). 11, 28, 29, 34

Cited Authorities

Page

Lechmere, Inc. v. NLRB,
502 U.S. 527 (1992) 5

Leocal v. Ashcroft,
543 U.S. 1 (2004) 26

Liparota v. United States,
471 U.S. 419 (1985) 12, 26, 27

McKennon v. Nashville Banner Publishing Co.,
513 U.S. 352 (1995) 16

Miller v. Image Data LLC,
91 Fed. Appx. 122 (10th Cir. 2004) 25, 34

Mt. Healthy City School District Board of Education v. Doyle,
429 U.S. 274 (1977) 16

Parus v. Kroeplin,
402 F.Supp.2d 999 (W.D. Wis. 2005) 34

Pichler v. UNITE,
228 F.R.D. 230 (E.D. Pa. 2005) 1, 8, 29

Pichler v. UNITE,
339 F. Supp. 2d 665 (E.D. Pa. 2004) 1, 7, 20

Cited Authorities

Page

Pichler v. UNITE,
446 F. Supp. 2d 353 (E.D. Pa.), *as amended*,
457 F. Supp. 2d 524 (E.D. Pa. 2006),
aff'd in part and rev'd in part, 542 F.3d 380
(3d Cir. 2008) ..... *passim*

Pichler v. UNITE,
457 F. Supp. 2d 524 (E.D. Pa. 2006),
aff'd in part and rev'd in part,
542 F.3d 380 (3d Cir. 2008) 1, 8

Pichler v. UNITE,
542 F.3d 380 (3d Cir. 2008) ..... *passim*

Pichler v. UNITE,
No. 04-2841 (E.D. Pa. April 15, 2008)
(Docket No. 257), *appeal pending*,
No. 08-2354 (3d Cir.) 36

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 16

Priebe & Sons v. United States,
332 U.S. 407 (1947) 12, 27, 31

Ramirez v. Cintas Corp.,
No. CV-04-281 (N.D. Cal.) 6

*Scheidler v. National Organization
for Women, Inc.*, 537 U.S. 393 (2003) 30

Cited Authorities

Page

Schmidt v. Multimedia Holdings Corp.,
361 F.Supp.2d 1346 (M.D. Fla. 2004) 34

Technology Service Solutions & International Brotherhood of Electrical Workers, Local 111,
332 N.L.R.B. 1096 (2000) 5

Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.,
525 F.3d 1107 (11th Cir. 2008) ..... *passim*

United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.,
508 U.S. 439 (1993) 29

United States v. Darden,
70 F.3d 1507 (8th Cir. 1995), *cert. denied*,
517 U.S. 1149 (1996) 17

United States v. Thompson/Center Arms Co.,
504 U.S. 505 (1992) 26

United States v. Tokars,
95 F.3d 1520 (11th Cir. 1996), *cert. denied*,
520 U.S. 1151 (1997) 17

Veliz v. Cintas Corp.,
No. C-03-1180 (N.D. Cal. 2003) 6

Page

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 16-17

Wemhoff v. District of Columbia, 887 A.2d 1004 (D.C. 2005) 33

Yee v. City of Escondido, 503 U.S. 519 (1992) 18-19

Statutes

5 U.S.C. § 552a 32

7 U.S.C. § 2024(b)(1) 27

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 7

Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 ..... *passim*

National Labor Relations Act, 29 U.S.C. §§ 151-169 14

Rules

Fed. R. Civ. Pro. 54(b) 1, 8

SUP. CT. R. 10(c) 12

Page

Other Authorities

RESTATEMENT (FIRST) OF CONTRACTS 30, 31

RESTATEMENT (SECOND) OF CONTRACTS 30

Petitioner UNITE (Union of Needletrades, Industrial & Textile Employees (AFL-CIO))[1] respectfully seeks a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 542 F.3d 380 (Appendix A, *infra*, 1a-50a). The order of the court of appeals denying the petition for rehearing *en banc* is unreported. (Appendix F, *infra*, 208a-209a).

The district court's interpretation of provisions of the DPPA is set forth in four opinions. The district court's opinion denying UNITE's motion to dismiss the action is reported at 339 F.Supp.2d 665 (Appendix E, *infra*, 198a-207a). The district court's opinion certifying a class is reported at 228 F.R.D. 230 (Appendix D, *infra*, 119a-197a). The district court's opinion granting plaintiffs' motion for summary judgment against UNITE and entering judgment in the amount of $2,500 for each named plaintiff is reported at 446 F.Supp.2d 353 (Appendix C, *infra*, 72a-118a). The district court's opinion amending the judgment to rule upon the remaining remedies requested by the named plaintiffs and to certify the amended judgment as final pursuant to Federal Rule of Civil Procedure 54(b) is reported at 457 F.Supp.2d 524 (Appendix B, *infra*, 51a-71a).

---

[1] Since this action was commenced, UNITE merged with another labor organization and its official name is now "UNITE HERE." "UNITE" will be used throughout this petition to refer to the labor organization now known as UNITE HERE.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 9, 2008. A timely petition for rehearing was denied on October 8, 2008. (App.208a-209a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case is the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725, which is reproduced in full at Appendix G, *infra*, 210a-217a. The sections of the statute pertinent to this petition are set forth below.

> 18 U.S.C. § 2721. Prohibition on release and use of certain personal information from State motor vehicle records
>
> . . .
>
> (b) Permissible uses. – Personal information . . . may be disclosed as follows:
>
> . . .
>
> (4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution

or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

. . .

18 U.S.C. § 2722. Additional unlawful acts

(a) Procurement for unlawful purpose. – It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

. . .

18 U.S.C. § 2723. Penalties

(a) Criminal fine. – A person who knowingly violates this chapter shall be fined under this title.

. . .

18 U.S.C. § 2724. Civil Action

(a) Cause of action. – A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies. – The court may award –

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

STATEMENT OF THE CASE

This case stems from a labor dispute between UNITE, the nation's largest union in the laundry industry, and Cintas Corporation, the nation's largest employer in the laundry industry with approximately 34,000 employees. Beginning in 2002, UNITE undertook a campaign to unionize Cintas employees, which Cintas has vehemently resisted. A key component of UNITE's campaign has been the investigation of legal claims of Cintas employees.

Because employees are reluctant to speak with union representatives at the worksite for fear of management retaliation, UNITE sought to visit with Cintas employees at their homes. One of the many ways that UNITE obtained home addresses was through a traditional union practice known as "tagging." Tagging involved recording license plate numbers from cars in

Cintas employee parking lots, from which contact information was obtained through public record databases on Westlaw or through private investigators. For years, unions have used MVR information to identify and contact employees to discuss their rights to organize. Indeed, this use of MVR information by unions has been recognized as a usual channel of communications with employees both before and after the DPPA was enacted.[2]

Beginning in January 2003, UNITE conducted approximately 3,000 visits to homes of Cintas employees over 18 months. When conducting home visits, UNITE representatives recorded information about Cintas' potential legal violations. By the time UNITE obtained and used the plaintiffs' MVR information to contact them, it was actively supporting actions against Cintas for patterns and practices of discriminatory conduct and

---

[2] *See, e.g., Technology Serv. Solutions & Int'l Bhd. of Elec. Workers, Local 111*, 332 N.L.R.B. 1096, 1103 (2000) (Fox, M., dissenting in part) (noting use of license plate numbers to get names and addresses is one of the "usual channels that nonemployee union organizers have historically attempted to use to communicate with employees about the advantages of organization"); *Hutzler Bros. Co. v. NLRB*, 630 F.2d 1012, 1015, 1016-17 (4th Cir. 1980) (reasoning that union had not proven it needed special access to communicate with employees where it had not proven it had exhausted reasonable channels of communications and observing that "it is routinely possible to obtain the names and addresses of the owners' licensed automobiles from the Maryland Motor Vehicles Department"). Indeed, before the DPPA's passage, this Court tacitly approved a union's using MVR information to reach employees where it cannot enter an employer's property. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 530 (1992) (noting union's success in identifying approximately 20% of a store's employees through motor vehicle records).

violations of federal legislation concerning overtime pay, including:

- In March 2003, twenty Cintas employees brought a class action, *Veliz v. Cintas Corp.*, No. C-03-1180 (N.D. Cal. 2003), alleging FLSA violations concerning drivers' overtime pay. More than 2,400 Cintas employees have opted in to *Veliz*;

- UNITE assisted Cintas employees in bringing *Ayon v. Cintas Corp.*, No. BC310696 (Cal. Super. Ct. 2004), and *Amaral v. Cintas Corp.*, No. HG03103046 (Cal. Super. Ct. 2003), for violations of living wage ordinances;

- In November 2003, UNITE filed a complaint with the EEOC alleging that Cintas discriminated on the basis of race, color, sex, and national origin, which in turn led to the filing in January 2004 of a class action, *Ramirez v. Cintas Corp.*, No. CV-04-281 (N.D. Cal.), in which the EEOC intervened as a plaintiff; and

- Dozens of additional lawsuits and administrative actions were commenced before the EEOC, OSHA, NLRB, and other agencies.

On June 28, 2004, plaintiffs, who are Cintas employees in Emmaus, Pennsylvania, and their relatives and housemates, brought an action against UNITE in

the United States District Court for the Eastern District of Pennsylvania complaining that UNITE had obtained their MVR information and used it to visit their homes and send them mail in violation of the DPPA.[3] Plaintiffs sought liquidated damages of $2,500 for each plaintiff as well as punitive damages, attorneys' fees, and injunctive relief. The plaintiffs contended that the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

UNITE moved to dismiss the complaint, arguing that reconciling federal labor policy with employee privacy issues is within the NLRB's primary jurisdiction. On October 13, 2004, the district court denied UNITE's motion to dismiss. In its opinion, the district court held that the DPPA's permitted use for litigation contained in 18 U.S.C. § 2721(b)(4) requires a "reasonable likelihood that the decision maker would find the [MVR] information useful in the course of the proceeding." 339 F.Supp.2d at 668 (App.202a). The district court subsequently incorporated this same "use to the decision maker" requirement into its test for determining the applicability of the anticipation of litigation exception. 446 F.Supp.2d at 368 (App.103a).

After class certification discovery, the district court entertained plaintiffs' motion for class certification. In

---

[3] Plaintiffs' complaint also named UNITE's president Bruce Raynor and the International Brotherhood of Teamsters as defendants. Plaintiffs settled with the Teamsters after the district court denied class certification against them. At the end of discovery, the district court granted judgment in Raynor's favor, 446 F.Supp.2d 353 (App.72a-118a), and the plaintiffs did not appeal that dismissal.

response to UNITE's argument that common questions did not predominate because each class member must prove his or her injury (in the words of the DPPA, "actual damages"), the plaintiffs waived any claim for actual damages, seeking instead only liquidated damages authorized by the Act's remedies provision. The district court then certified a class comprising approximately 1,758 to 2,005 persons whose MVR information UNITE had obtained during the Cintas campaign, and held that each class member need not demonstrate actual damages to recover liquidated damages. 228 F.R.D. at 247 (App.155a). In that same opinion, the district court addressed the state-of-mind requirement of the statute, holding that the word "knowingly" in the DPPA civil remedy provision applies only to determine whether or not the defendant knew he obtained MVR information, not whether he did so with any culpable state of mind. *Id.* at 241-42 (App.141a-142a).

The parties subsequently filed cross-motions for summary judgment. On August 30, 2006, the district court rejected UNITE's reliance on the DPPA's litigation exception and entered judgment against UNITE in favor of the class representatives. 446 F.Supp.2d at 368-70, 373 (App.103a-108a, 116a). On October 17, 2006, the district court amended the judgment to make it final for purposes of Rule 54(b) certification. 457 F.Supp.2d 524 (App.51a-71a). The district court exercised its discretion to limit the damages awarded to each plaintiff to $2,500 and to deny punitive damages. *Id.* at 529-532 (App.59a-66a). Finally, the district court enjoined UNITE from using the plaintiffs' MVR information. *Id.* at 532-34 (App.66a-70a).

Both parties appealed the district court's judgment to the Third Circuit. A divided panel agreed with plaintiffs' contention that the district court erred in failing properly to apply the summary judgment standards with respect to plaintiffs' demands for punitive damages and multiple awards of liquidated damages for multiple uses of MVR information. The panel majority rejected each of UNITE's arguments that summary judgment had been improperly entered against it.

For example, UNITE argued that its conduct came within the DPPA's permitted use for litigation, which the district court had misconstrued, as demonstrated by the Eleventh Circuit's decision in *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107 (11th Cir. 2008).[4] Over the dissent of Third Circuit Judge Dolores Sloviter, who would have followed the Eleventh Circuit's approach, Judges Michael Chagares and Thomas Hardiman of the Third Circuit found that they "need not address the District Court's interpretation of the litigation [exception]" finding that "[b]ecause UNITE obtained and used the confidential information for an impermissible purpose – union organizing – it does not matter what other permissible purpose UNITE may have had." 542 F.3d at 395 (App.31a). The majority reached this conclusion even though the DPPA – which assumes that a person has *either* a permitted purpose, in which case MVR

[4] In *Thomas*, the Eleventh Circuit concluded that "[t]he litigation clause refers to investigation *in anticipation* of litigation. . . . [W]e do not see how pre-suit investigation can be considered per se inapplicable to the litigation clause." 525 F.3d at 1115 n.5.

information may be disclosed under 18 U.S.C. § 2721(b), *or* a non-permitted purpose, in which case obtaining MVR information is a violation under 18 U.S.C. § 2724(a) – is silent on whether or not liability may be imposed on a person who acts with two purposes.

The Third Circuit also rejected UNITE's argument that a party may not be found liable under the DPPA if it did not know that its purpose for obtaining MVR information was wrongful given that the DPPA uses the term "knowingly" in virtually identical sections providing for criminal and civil liability. *Compare* 18 U.S.C. § 2724(a) (App.216a) *and* 18 U.S.C. § 2722(a) (App.215a). Instead, the Third Circuit found that Section 2723(a) ("Criminal fine") rather than Section 2722 ("Additional unlawful acts") defined the act giving rise to criminal liability under the DPPA, and it therefore extrapolated that "Congress differentiated between a knowing acquisition, disclosure, or use to establish civil liability, and any knowing violation to establish liability for a criminal fine." 542 F.3d at 397 (App.36a). In addition, the panel concluded that the DPPA's punitive damages provision, which authorizes punitive damages for "reckless" conduct, also supported imposition of liability when the defendant knew that the information came from motor vehicle records, even though he did not otherwise have a culpable state of mind. *Id.* (App.36a-37a).

Finally, the Third Circuit rejected UNITE's argument that a plaintiff who has neither pled nor suffered any harm is not entitled to $2,500 pursuant to Section 2724(b)(1). 542 F.3d at 397-400 (App.37a-42a). In interpreting the DPPA's provision that a court "may

award" "actual damages, *but not less than* liquidated damages in the amount of $2,500" (18 U.S.C. § 2724(b) & (b)(1)) (App.216a), the Third Circuit found that "the second phrase of § 2724(b)(1) is not dependent upon proof of actual damages, but rather . . . the two clauses are to be read in the disjunctive: a plaintiff 'may receive the greater of his actual damages or $2,500.00.'" *Id.* at 398 (citing *Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209, 1213 (11th Cir. 2005), *cert. denied*, 547 U.S. 1051 (2006)) (App. 38a).

Accordingly, in a 2-1 decision, the Third Circuit remanded the case to the district court for a determination of punitive and multiple liquidated damages awards but affirmed the decision of the district court on the liability issues that UNITE had appealed.

REASONS FOR GRANTING THE PETITION

The result of the Third Circuit's interpretation of the DPPA is to impose liability on a person who knowingly obtains MVR information for a purpose permitted by the Act, merely because the person also had a purpose that is not expressly permitted by the Act, even though the person did not know that his conduct was wrongful and even though no injury resulted from his use of the information.

The Court should grant this petition for two compelling reasons. First, the Third Circuit's interpretation of the DPPA is inconsistent with this Court's precedents: (i) its dual purpose holding diverges from the Court's precedents in mixed motive analysis; (ii) its conclusion that the term "knowingly" can be

interpreted to have different meanings in the civil and criminal provisions of the DPPA contravenes this Court's basic canon of statutory interpretation, as well as its analysis in *Liparota v. United States*, 471 U.S. 419 (1985); and (iii) its interpretation of the Act's remedies provisions fails to account for the provision's grammatical construction (in disregard of this Court's principles of statutory interpretation), fails to consider the common law meaning of the phrase "liquidated damages" as illustrated by this Court's holding in *Priebe & Sons v. United States*, 332 U.S. 407 (1947), and reaches a conclusion that is inconsistent with this Court's decision in *Doe v. Chao*, 540 U.S. 614 (2004). *See* SUP. CT. R. 10(c) (certiorari may be granted where "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"); *see also Army & Air Force Exch. Svc. v. Sheehan*, 456 U.S. 728, 733 (1982) (noting that certiorari was granted because the Fifth Circuit's ruling "appeared to be in conflict with our precedents").

Second, the petition presents four important questions concerning the interpretation of the DPPA that should be decided by this Court. *See* SUP. CT. R. 10(c) (certiorari may be granted where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . ."). Indeed, in *Fidelity Federal Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006), Justices Scalia and Alito noted, in their concurrence in the denial of certiorari, that the interpretation of the state of mind requirement and damages provisions of the DPPA are "important legal question[s]" as to which, at the right

time, it may "be appropriate for [the Court] to consider granting certiorari . . . ." UNITE respectfully submits that this petition provides the Court with an appropriate context in which to consider these important issues.

In sum, this Court should hear this case because the Third Circuit's interpretation of the DPPA threatens substantial liabilities to innocent parties based on an improper interpretation of the DPPA.

A. THE COURT SHOULD GRANT THIS PETITION TO RESOLVE THE INCONSISTENCY BETWEEN THE THIRD CIRCUIT'S INTERPRETATION OF THE DPPA AND INSTRUCTIVE PRECEDENTS OF THIS COURT.

1. The Third Circuit's "Dual Purpose" Holding Conflicts With This Court's Analysis of Mixed Motive Cases and Fails to Resolve the Conflict in the Interpretation of the DPPA's Litigation Exception Between the District Court and the Eleventh Circuit.

a. The Third Circuit's determination that a party who obtains MVR information for two purposes, one of which is not permitted by the DPPA, is necessarily liable for violating the Act conflicts with this Court's analysis in mixed motive cases.

The Third Circuit panel divided on the "dual purpose" issue: whether a person who obtains MVR

information for multiple purposes violates the Act merely because one of the purposes is not permissible under the DPPA. The construction adopted by the panel majority results in liability when a person obtains, uses, or discloses MVR information for dual purposes where one of the purposes is not expressly permitted by the Act, even if the impermissible purpose is secondary, incidental, otherwise legal, or expressly permitted by another statute or federal policy and does not increase the intrusion on the driver's privacy occasioned by the permissible use. In this case, longstanding federal policy not only permits but encourages the non-permitted second purpose: advising employees about their Section 7 rights to organize under the NLRA, 29 U.S.C. §§ 151-169.

This lawsuit arises in the context of UNITE's campaign to organize workers at Cintas, the largest employer in the industrial laundry industry. As Judge Sloviter explained in her dissent (542 F.3d at 400-01 (App.44a-45a)), and as the panel majority acknowledged (542 F.3d at 383 (App.3a)), UNITE made investigation of Cintas's legal violations of workers' rights and workplace safety standards a key aspect of its campaign. By the time UNITE obtained the *Pichler* plaintiffs' MVR information, it was actively supporting class actions against Cintas for patterns and practices of discriminatory conduct and violations of federal legislation concerning overtime pay. UNITE argued to the courts below that it had not violated the DPPA because it had a permissible purpose for using the MVR information during its organizing campaign: the investigation of pending and potential litigation against

Cintas. Plaintiffs argued that the presence of an impermissible purpose – union organizing – established liability.

This dispute is grounded in the structure of the statute itself. The DPPA permits people to obtain MVR information for fourteen enumerated uses. 18 U.S.C. § 2721(b) ("Personal information . . . may be disclosed as follows . . . .") (App.210a-211a). It also imposes civil liability on a "person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter." 18 U.S.C. § 2724(a) (App.216a). Put differently, the statute allows the use of MVR information for a permitted purpose and imposes liability when the MVR information is used for a purpose not permitted. It is silent about the liability of a person who uses MVR information for dual purposes, neither of which is the criminal stalking activity that the DPPA's legislative history demonstrates motivated passage of the Act. *See* 542 F.3d at 400 (App.43a) (Sloviter, J., dissenting). Even though in the real world, parties frequently have mixed motives for any conduct, the Third Circuit panel majority focused its analysis on the liability section of the DPPA, disregarding the section of the Act that authorizes use of MVR information for the fourteen enumerated purposes and refusing to weigh the dual purposes as it would in other mixed motives circumstances. UNITE submits this was error, conflicting with this Court's precedents in mixed motive situations.

Mixed motive cases most often arise in the employment context, where statutes prohibit employers from terminating employees for impermissible reasons

(*e.g.*, age, sex, race). This Court has often addressed situations where an employee was terminated for both an impermissible reason *and* a permissible reason (*e.g.*, repeated absences, poor job performance). In those cases, this Court has held that if the lawful reason alone would have sufficed to justify the firing, the employee could not prevail in a suit against the employer. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality op.); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). This Court summarized *Mt. Healthy* in a 1995 decision as follows:

> In *Mt. Healthy* we addressed a mixed-motives case, in which two motives were said to be operative in the employer's decision to fire an employee. One was lawful, the other (an alleged constitutional violation) unlawful. We held that if the lawful reason alone would have sufficed to justify the firing, the employee could not prevail in a suit against the employer. The case was controlled by the difficulty, and what we thought was the lack of necessity, of disentangling the proper motive from the improper one where both played a part in the termination and the former motive would suffice to sustain the employer's action.

McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 359 (1995); *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 271 (1977) (noting that proof that a zoning decision was motivated in part by a racially discriminatory purpose would not necessarily have invalidated the decision, but would

have shifted the burden to the defendant to show that the same decision would have resulted even had the impermissible purpose not been considered).[5]

Here, however, the Third Circuit held that if a person who obtained MVR information had any non-permitted purpose for obtaining the information, however slight, that person was liable under the DPPA. As Judge Sloviter noted in her dissent, the majority of the Third Circuit panel departed from "the approach courts have historically used in situations where there are multiple purposes." Citing this Court's opinions in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003), and *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23, 35 (1987)[6], Judge Sloviter would have required the fact-finder in a DPPA suit to determine which purpose was primary. 542 F.3d at 402-03 (App.49a).

The two judges who constituted the majority of the Third Circuit panel refused to consider a primary-

---

[5] Similar mixed motive analyses have been applied in other contexts, including the propriety of the exercise of peremptory challenges in jury selection. *See, e.g., Gattis v. Snyder*, 278 F.3d 222, 234-35 (3d Cir. 2002); *United States v. Tokars*, 95 F.3d 1520, 1533 (11th Cir. 1996), *cert. denied*, 520 U.S. 1151 (1997); *United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995), *cert. denied*, 517 U.S. 1149 (1996); *Howard v. Senkowski*, 986 F.2d 24, 26-30 (2d Cir. 1993).

[6] Judge Sloviter cites *Groetzinger*, 480 U.S. at 35, for the proposition that the determination whether income arises from a business under the Internal Revenue Code requires an examination whether "the taxpayer's *primary purpose* for engaging in the activity must be for income or profit" (emphasis supplied).

secondary approach to the mixed motive issue because they found that UNITE had waived the argument by not raising it until oral argument. 542 F.3d at 396 n.19 (App.33a). UNITE submits that there was no waiver because it consistently maintained that it could not be held liable under the DPPA in light of its use of MVR information in connection with its investigation and prosecution of litigation against Cintas, which was inextricably intertwined with its organizing motive. *See* 542 F.3d at 395-96 (App.31a-33a). Indeed, the district court's statement concerning dual purposes (446 F.Supp.2d at 367 (App.100a)) was *dicta* because the finding that UNITE's activities did not come within the DPPA's litigation exception was the predicate for the entry of judgment in favor of plaintiffs. Nonetheless, both sides' appellate court briefs addressed *Hartman v. Department of Conservation & Natural Resources*, 892 A.2d 897, 905 (Pa. Commw. Ct. 2006) (the case cited in the District Court's dual purpose analysis (446 F.Supp.2d at 367 n.39 (App. 101a)), which denied a publisher access to MVR information to mail Pennsylvania's Snowmobile Association's magazine to snowmobilers on the grounds that "the requested information would be used *primarily* to promote snowmobiling in Pennsylvania and membership in the PSSA" rather than promoting safety under § 2721(b)(12) (emphasis supplied)). Whether or not there was a waiver, however, Judge Sloviter concluded that the question whether a mixed motive analysis applies to the DPPA is of such extraordinary public importance that the Third Circuit should have exercised its discretion to consider the primary-secondary argument. 542 F.3d at 403 (App.49-50a). In light of this Court's power to consider all arguments concerning issues that have been properly preserved, *Yee v. City of Escondido*,

503 U.S. 519, 534 (1992), this Court should not allow the Third Circuit's erroneous interpretation of the DPPA to continue.

This Court should grant this petition to determine when liability can be imposed under the DPPA when MVR information is obtained and used for both permitted and non-permitted purposes.

b. Any conclusion that UNITE did not have a permitted purpose is based on the district court's overly restrictive interpretation of the DPPA's permitted use for litigation which conflicts with the Eleventh Circuit's holding in Thomas.

Implicit in UNITE's request that this Court address the dual purpose issue is its belief that its conduct comes within the DPPA's permitted use for litigation. 18 U.S.C. § 2721(b)(4) (App.212a). Because the Third Circuit panel's holding affirms the district court's *dicta* that a party acting with both a permitted and a non-permitted purpose is liable under the DPPA, it never addressed the district court's holding that UNITE's activities did not come within the DPPA's permitted use for litigation. *Compare* 446 F.Supp.2d at 367 (App.101a) *and* 542 F.3d at 395 (App.31a). Accordingly, the panel majority left undisturbed, and arguably signaled[7] its approval of, the

[7] In footnotes 18 and 20 of the Third Circuit's majority opinion 542 F.3d at 395, 396 (App.32a, 34a), the panel majority both rejects Judge Sloviter's reliance on a quotation from *Thomas* on the grounds that it is *dicta* and expresses a concern about an expansion of the litigation permitted use. These (Cont'd)

district court's unduly restrictive construction of the permissible use of MVR information in connection with litigation – a construction that conflicts with the Eleventh Circuit's decision in *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King & Stevens, P.A.*, 525 F.3d 1107 (11th Cir. 2008), as Judge Sloviter recognized in her dissenting opinion. 542 F.3d at 401-02 (App.47a).

The DPPA's litigation exception permits people to obtain MVR information

> [f]or *use in connection with* any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, *including* the service of process, *investigation in anticipation of litigation*, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. §2721(b)(4) (emphasis supplied) (App.212a). The district court here opined that the term "use" requires a "reasonable likelihood that the decision maker would find the [MVR] information useful in the course of the proceeding." 339 F.Supp.2d at 668 (App.202a). The district court then incorporated this

---

(Cont'd)
statements imply that the panel majority would affirm the district court's interpretation of the litigation exception. Thus, there is a tension, if not a conflict, between the approaches of the Third and Eleventh Circuits to the interpretation of Section 2721(b)(4).

interpretation into its three-part test for determining the applicability of the anticipation of litigation exception, which required

> there must be an actual investigation, litigation must appear likely at the time of the investigation, and the protected information acquired during the investigation must be of "use" in the litigation, meaning that there was "a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding."

446 F.Supp.2d at 368 (App.103a). Notwithstanding the statute's broad language, the district court effectively read the provision providing for "use in connection with . . . investigation in anticipation of litigation" out of the statute by finding that the litigation exception requires that the ultimate decision maker, be it jury or judge, find the information garnered from each use of a person's MVR information to be useful in the litigation. Any investigation necessarily requires that the investigator sift through information – both useful and non-useful – in order to identify useful information. Requiring that an investigation produce only useful information is an impossibility; if the investigator were aware of the information that will be useful, there would be no need for the investigation in the first place.

As noted in the dissenting opinion of Judge Sloviter, the district court's construction is at odds with the Eleventh Circuit's construction of the litigation exception. 542 F.3d at 401-02 (App.47a). In *Thomas*, the

defendant law firm had obtained 284,000 driving records of Florida residents to find witnesses to testify against automobile dealers against whom it was litigating. 525 F.3d at 1109-10. The law firm then used the MVR information to send 1,000 letters aimed at obtaining evidence showing a custom and practice of deceptive acts engaged in by automobile dealerships, even though the law firm did not know ahead of time whether each recipient would have information that would make him or her a viable witness. *Id.* On appeal, the plaintiff challenged the applicability of the DPPA's litigation permitted use where the law firm sent letters to only approximately 0.3% of the people whose names it acquired. The Eleventh Circuit affirmed summary judgment for the law firm, finding that the DPPA's permitted use of information in connection with litigation was applicable because "[b]y affixing significance solely to the number of records relating to letters sent out, [Plaintiff] overlooked that [the attorney's] initial review of the total amount of records is just as much tied to 'investigation in anticipation of litigation' as the eventual sending out [of the letters]." *Id.* at 1115.

Moreover, rejecting plaintiff's argument that the attorney had an "ulterior motive" – to create a database of witnesses for prospective, as contrasted with already pending, cases – the Eleventh Circuit stated that because "[t]he litigation clause refers to investigation *in anticipation* of litigation. . . . [W]e do not see how pre-suit investigation can be considered per se inapplicable to the litigation clause." *Id.* at 1115 n.5 (emphasis in original). The Eleventh Circuit's recognition in *Thomas* that the DPPA permits a party's or counsel's use of MVR information in a litigation-

related investigation is inconsistent with the district court's requirement in *Pichler* that the MVR information be of use to the decision-maker.

Both Judge Sloviter's dissent and the Eleventh Circuit's decision demonstrate the flaws in the district court's restrictive interpretation of the litigation exception, which underlies its determination that UNITE was not acting for a permitted purpose. Because the Third Circuit majority's approach on the dual purpose question diverges from this Court's precedents in mixed-motive cases, and because UNITE's conduct would have been held to be a permitted purpose under the interpretation of the litigation use adopted by the Eleventh Circuit, this Court should grant this Petition and determine when liability may be imposed on a DPPA defendant who has more than one purpose for obtaining and using MVR information.

2. The Third Circuit's Conclusion That the Term "Knowingly" Means Something Different in the Criminal and Civil Liability Sections of the DPPA Contravenes This Court's Prior Decisions.

Another question presented in this petition is whether a party may be found liable under the DPPA if it did not know that its purpose for obtaining MVR information was wrongful. The section of the DPPA which provides for civil liability states:

> A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted

> under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

18 U.S.C. § 2724(a) (App.216a). This section is virtually identical to the section that provides for criminal liability, which states:

> It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

18 U.S.C. § 2722(a) (App.215a). Nevertheless, the Third Circuit construed the term "knowingly" to mean something different in the civil and criminal provisions of the Act. 542 F.3d at 397 (App.36a) ("[W]e hold that Congress differentiated between a knowing acquisition, disclosure, or use to establish civil liability, and any knowing violation to establish liability for a criminal fine."). This holding contravenes the "basic canon of statutory interpretation" that identical words or terms used in different parts of the same act are interpreted to have the same meaning. *See Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 250 (1996); *see also Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992).

The Third Circuit's justification for its holding – that Section 2723 ("Penalties") provides for criminal liability rather than Section 2722 ("Additional unlawful acts") – is unpersuasive for several reasons. First, if the "unlawful acts" set forth in Section 2722 (and Section

2721) do not define the criminal acts under the DPPA, what possible purpose do they serve? Second, it cannot be the case that Section 2722 defines the DPPA violations for purposes of *both* criminal and civil liability because the conduct prohibited by Section 2724(a) is broader than that prohibited by Section 2722(a) in that Section 2724(a) makes a person liable not only for "obtain[ing]" and "disclos[ing]" personal information (as under 2722(a)), but also for the use of the information (which is not included in 2722(a)). Third, the Third Circuit's interpretation that Section 2722(a) "does not create civil or criminal liability" is inconsistent with the uncontroverted interpretation that Section 2722(b) does, in fact, create criminal liability. *See Miller v. Image Data LLC*, 91 Fed. Appx. 122, 127 (10th Cir. 2004) (providing that enforcement of violations of Section 2722(b) is handled by the United States Department of Justice). Finally, Section 2724(a) does not refer back to Section 2722 to define civil liability.

Ultimately, Section 2722 cannot be the predicate for civil as well as criminal liability under the DPPA because it adds nothing to and in fact, is narrower than Section 2724(a). The only possible reading of the DPPA is that Section 2722 (with Section 2721) defines the unlawful acts for purposes of criminal liability and Section 2723 provides the penalties for these violations, while Section 2724(a) sets forth the DPPA civil cause of action and Section 2724(b) sets forth the remedies a plaintiff may obtain. However, this cannot be reconciled with the Third Circuit's interpretation that the word "knowingly" means something different in the criminal section of the DPPA than it does in the civil section.

In addition to running counter to this Court's "basic canon of statutory construction" as set forth in *Lundy*, 516 U.S. at 249-50, the Third Circuit's decision runs counter to this Court's opinions that a statute with both criminal and civil applications must be construed in the same manner for both types of liability. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (noting statute with criminal and non-criminal applications must be interpreted consistently); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 & n.10 (1992) (plurality op.). Furthermore, as a matter of common sense, the use of the term "knowingly" must mean the same thing in "[i]t shall be unlawful for any person *knowingly* to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title" as it does in "[a] person who *knowingly* obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court." *Compare* 18 U.S.C. § 2722(a) *and* 18 U.S.C. § 2724(a) (emphasis supplied).

Furthermore, if one accepts the contention that the use of the word "knowingly" in both the civil and criminal provisions requires the same state of mind to impose criminal or civil liability, then this Court's decision in *Liparota v. United States*, 471 U.S. 419 (1985), also requires a reexamination of the state of mind requirement for DPPA liability. In *Liparota*, the Court construed statutory language imposing liability for food stamp fraud on a person who "knowingly uses, transfers, acquires, alters or possesses coupons or authorization cards in any manner not authorized by [the statute] or

the regulations." *Id.* at 420 (interpreting 7 U.S.C. § 2024(b)(1)). The Court interpreted this statute's pertinent language, which is structured similarly to that in the DPPA's section 2724(a), to require proof that a defendant appreciated not only the facts that would render him liable, but also that his actions were unlawful. In the face of the statute's ambiguity about the elements to which the term "knowingly" extended, this Court followed the rule of lenity, which requires that any ambiguity in criminal statutes be resolved in favor of lenity, ensuring that criminal statutes provide fair warning of illegal conduct. *Id.* at 424, 427. Because the use of the term "knowingly" in DPPA sections 2722(a) and 2724(a) is similarly ambiguous, and because section 2722(a) provides for criminal liability, the reasoning of *Liparota* is directly applicable. Nevertheless, the Third Circuit failed to square its holding with, or even to mention, the holding in *Liparota*.

For all these reasons, this Court should address what state of mind is required to impose civil liability for a violation of the DPPA.

3. The Third Circuit's Interpretation of the DPPA's Remedies Provision As Entitling Each Prevailing Plaintiff to $2,500, Regardless of Whether or Not He or She Suffered Any Actual Damages, Conflicts With This Court's Statutory Construction Principles and Its Decisions in *Doe v. Chao* and *Priebe & Sons v. United States*.

The Third Circuit's analysis of the remedies provision of the DPPA also diverged from this Court's

prior holdings. The DPPA provides that a court "may award" "actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724(b) & (b)(1) (App.216a). In concluding that each plaintiff was entitled to $2,500 in liquidated damages regardless of whether he or she was damaged in any way, the Third Circuit failed to apply this Court's statutory construction principles in two respects. First, it misconstrued the grammatical construction of the text of the statute to find that a court may award actual damages *or* $2,500. Second, it failed to appreciate that the understanding of the term "liquidated damages" at common law requires that the plaintiff demonstrate some actual damage in order to recover $2,500. As a result, the Third Circuit's holding is inconsistent with the DPPA's text and with this Court's decision in *Doe v. Chao*, 540 U.S. 614 (2004).

In determining whether the phrase "but not less than liquidated damages in the amount of $2,500" modified "actual damages" or provided for a separate alternative award, the Third Circuit concluded that the two phrases should be read in the disjunctive. In so ruling, it relied on the Eleventh Circuit's decision in *Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005), finding that "the second phrase of § 2724(b)(1) is not dependent upon proof of actual damages, but rather . . . the two clauses are to be read in the disjunctive: a plaintiff 'may receive the greater of his actual damages or $2,500.00.'" 542 F.3d at 398 (App.38a). Because this interpretation misconstrues the DPPA's plain language interpreted in light of basic rules of grammar, it is inconsistent with the principles of statutory construction adopted by this Court.

This Court has repeatedly noted that a court must presume that the legislature says what it means and means what it says in the statutory text. *See BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). Statutory construction entails reading the statute as a whole and accounting for a statute's text, language, punctuation, structure, and subject matter. *See United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). However, the Third Circuit disregarded those principles, finding that notwithstanding the grammatical construction of the DPPA's remedies provision, the "two clauses are to be read in the disjunctive." 542 F.3d at 398 (App.38a).

The DPPA's remedies provision has two clauses: the first part ("the court may award actual damages") is an independent clause that is capable of standing on its own; and the second part ("but not less than liquidated damages in the amount of $2,500") is a dependent clause as it has no subject or verb of its own and must rely on the main clause to complete its meaning. Indeed, even the district court in this case acknowledged that "from a grammatical standpoint, there is no doubt that the dependent clause 'but not less than liquidated damages in the amount of $2,500' 'depends' on the independent clause 'actual damages.'" 228 F.R.D. at 245 (App.150a). Nevertheless, relying on the Eleventh Circuit's misinterpretation in *Kehoe*, the Third Circuit found that the two clauses were independent clauses that should be read in the disjunctive.[8] This analysis fails properly to apply this Court's principles of statutory construction.

---

[8] Ironically, the Third Circuit here relied on the Eleventh Circuit's interpretation in *Kehoe* which, in turn, relied on the (Cont'd)

The Third Circuit further erred in finding that the statute's use of the term "liquidated damages" supported its position. Again, this Court's principles of statutory interpretation require that when a statute incorporates a phrase to which the courts have attributed a uniform meaning, the statutory phrase should be given that meaning. *See, e.g., Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003) ("Absent contrary direction from Congress, we begin our interpretation of statutory language with the general presumption that a statutory term has its common-law meaning.") (citations omitted).

Application of that principle here required the Third Circuit to look at the broad body of precedent concluding that a liquidated damages provision in a contract is enforceable only if it is a reasonable estimate of actual damages as judged before and after the breach has occurred (and hence not a penalty). *See* RESTATEMENT (FIRST) OF CONTRACTS § 339 cmt. e (1932) (liquidated damages clauses are unenforceable "when in fact the breach, causes no harm at all"); RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (1981) ("If, to take an extreme case, it is clear that no loss at all has occurred, a provision fixing a substantial sum as damages is unenforceable."); *see also Colonial at Lynnfield, Inc. v. Sloan*, 870 F.2d 761, 765 (1st Cir. 1989) ("[L]iquidated damages may not be awarded because it is easy to see that [plaintiff] in

---

(Cont'd)

district court's interpretation below. However, as discussed above, the district court actually found there to be "no doubt" that "but not less than liquidated damages" depended on "actual damages."

fact suffered no damage."); *Hubbard Bus. Plaza v. Lincoln Liberty Life Ins. Co.*, No. 87-1573, 1988 WL 31909, at *2 (9th Cir. April 4, 1988) (holding that where defendant suffered no damages, the "liquidated damages clause . . . should be considered an unenforceable penalty."); *Finkle v. Gulf & W. Mfg. Co.*, 744 F.2d 1015, 1021 (3d Cir. 1984) ("'If the amount of damages assessed is subsequently adjudged unreasonable in the light of either anticipated or actual harm, the liquidated damages provision will be voided as a penalty . . . .'") (citation omitted).

Indeed, more than a half-century ago, this Court relied upon the common-law meaning of liquidated damages in voiding a liquidated damages provision of a government contract. In *Priebe & Sons v. United States*, 332 U.S. 407 (1947), this Court, relying upon Section 339 of the RESTATEMENT (FIRST) OF CONTRACTS, found a "liquidated damages" provision in a government contract unenforceable because its breach caused no damage. *Id.* at 412-13.

Congress's inclusion of the term "liquidated damages" in the DPPA similarly indicates that Congress intended to require *some* evidence of a DPPA plaintiff's actual damages. The Third Circuit's conclusion to the contrary disregards both this Court's analysis in *Priebe* and its principles of statutory construction.

Moreover, a construction of the remedies provision that requires that a plaintiff show some damage before he is entitled to the minimum award of $2,500 is in accord with this Court's decision in *Doe v. Chao*, 540 U.S. 614 (2004). In that case, this Court interpreted the remedies provision of the Privacy Act to require a plaintiff to prove

actual damages in order to recover the $1,000 minimum award. *Id.* at 627. The Privacy Act provides that if a violation occurs: "the United States shall be liable to the individual in an amount equal to the sum of – (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000 . . ." 5 U.S.C. § 552a(g)(4) & (g)(4)(A). This Court interpreted this provision to follow the traditional common law requirement that a plaintiff must demonstrate proof of harm to recover the statutory damages. Indeed, it noted that "it was hardly unprecedented for Congress to make a guaranteed minimum contingent upon some showing of actual damages, thereby avoiding giveaways to plaintiffs with nothing more than abstract injuries." 540 U.S. at 625-26. Nonetheless, the Third Circuit cited *Doe* as supporting its interpretation that a plaintiff not need demonstrate actual damages to receive $2,500 under the DPPA. 542 F.3d at 398 (App.39a).

Therefore, the Court should grant this Petition to address the proper interpretation of the remedies provisions of the DPPA in light of this Court's principles of statutory construction and its holding in *Doe v. Chao.*

B. THIS PETITION PRESENTS IMPORTANT LEGAL QUESTIONS CONCERNING THE CIVIL LIABILITY PROVISIONS OF A FEDERAL STATUTE THAT HAS UNEXPECTEDLY BROAD RAMIFICATIONS AND ENORMOUS POTENTIAL LIABILITY.

This petition presents fundamental questions concerning the interpretation of the civil liability provisions of the DPPA that are critical to its enforcement. This Court's guidance is necessary to resolve ambiguity about when a person may be held liable for the liquidated damages authorized by the Act.

Individuals, corporations, and government entities have a wide variety of legitimate reasons for needing the MVR information, the accessibility of which is governed by the DPPA. This is illustrated by the volume and diversity of DPPA litigation in recent years:

- *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107 (11th Cir. 2008) – A DPPA class action against a law firm relating to its obtainment of MVR records to investigate factual allegations in litigation;

- *Wemhoff v. District of Columbia*, 887 A.2d 1004 (D.C. 2005) – An attorney's Freedom of Information Act action to obtain MVR records in order to identify individuals who had been wrongfully ticketed by a malfunctioning traffic signal and whom he sought to represent;

- *Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005), *cert. denied*, 547 U.S. 1051 (2006) – A DPPA class action against a bank that used MVR information to identify individuals who recently purchased cars so that the bank could provide those persons with refinancing information;

- *Schmidt v. Multimedia Holdings Corp.*, 361 F.Supp.2d 1346 (M.D. Fla. 2004) – A DPPA action on behalf of as many as 479,500 proposed class members contending that the defendant obtained the class members MVR information from the state motor vehicle office for marketing purposes;

- *Miller v. Image Data LLC*, 91 Fed. Appx. 122 (10th Cir. 2004) – A DPPA action against a provider of digital portrait images to retailers for identity verification purposes, when the images came from the Colorado DMV;

- *Parus v. Kroeplin*, 402 F.Supp.2d 999 (W.D. Wis. 2005) – A DPPA action against a town police dispatcher who responded to a request for license plate information from a prospective purchaser of the motor vehicle; and

- *Hartman v. Department of Conservation & Natural Resources*, 892 A.2d 897 (Pa.

Commw. Ct. 2006) – A Right-to-Know Law action by the publisher of a snowmobile magazine against the state motor vehicle agency challenging its denial of his request for the identities of registered snowmobilers.

Given this diversity of situations in which individuals and entities have sought to obtain and use MVR information, most of which were never considered when Congress passed the DPPA "to protect the privacy of persons from stalkers and potential criminals," 542 F.3d at 400 (App.43a), it is important that this Court provide guidance concerning when DPPA liability may be imposed.

Moreover, without guidance from this Court, persons and entities with a variety of legitimate needs for the information may refrain from gathering the information rather than run the risk of enormous potential liability under the DPPA. For example, the DPPA permits the use of MVR records for "matters of motor vehicle or driver safety." 18 U.S.C. § 2721(b)(2). Accordingly, a car company is allowed to obtain and use MVR information to advise owners of a safety issue with their vehicles that could be repaired by the company-owned service centers; nonetheless, it might refrain from doing so as a result of a concern that its mailing might be viewed as a liability-creating improper solicitation of business for the service centers under the Third Circuit's dual purpose analysis. The chilling effect of the Third Circuit's dual purpose decision on the legitimate obtainment of MVR records provides an additional reason that the Court should grant this petition.

Further, the need for guidance is magnified by the size of the potential judgments in DPPA litigation. The potential award of $2,500 in liquidated damages to every person whose information was accessed may result in damages that will cripple or destroy the persons or organizations that accessed the MVR. This *Pichler* case involves a class of between 1,758 and 2,005 persons. Awarding each *Pichler* class member a minimum of $2,500 may result in a judgment of at least $4,395,000. That amount may increase exponentially if, on remand, the district court concludes that a separate award of liquidated damages is appropriate for each use of each absent class member's MVR information; for example, two-thirds of the named plaintiffs complain of at least two uses of their information. 542 F.3d at 392 n.13 (App.23a). Moreover, currently pending in the courts below is a motion by the National Right to Work Foundation to obtain the names and addresses of as many as 12,000 non-Cintas employees whose MVR information was allegedly obtained and used by UNITE so that they may be notified that their rights have been violated. *See Pichler v. UNITE*, No. 04-2841 (E.D. Pa. April 15, 2008) (Dkt. No. 257), *appeal pending*, No. 08-2354 (3d Cir.). If the Foundation prevails on that motion, and any of the persons so notified were to bring similar class actions against UNITE, the union's potential liability could reach $30,000,000 or more, even though most of those people suffered no actual damages as a result of UNITE's obtaining their information. This is just the tip of the iceberg of potential liability under the DPPA. In *Thomas*, the defendant obtained 284,000 driving records while the defendant in *Kehoe* obtained 565,000 driving records. The potential liability in these two cases was therefore at least $710,000,000 and $1.4 billion, respectively.

The amounts potentially at issue confirm the need for a uniform national standard of liability.

Justices Scalia and Alito have previously observed, in an opinion concurring in the denial of certiorari in *Fidelity Federal Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006), that two of the issues presented by this petition – whether a plaintiff must show actual damages to recover under the DPPA and whether a defendant must knowingly violate the DPPA to be liable – are "important legal question[s]" that at the appropriate time "may be appropriate for [the Court] to consider granting certiorari . . . ." *Kehoe* came before the Court in 2006 on a petition for certiorari which raised the issue whether a plaintiff must show actual damages to recover under the DPPA. Justices Scalia and Alito noted that "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Id.* at 1051. Nonetheless, they concurred that the petition was not ripe for consideration by the Court because the lower courts in that case had not yet addressed the DPPA's state of mind requirement and there was a possibility that the Eleventh Circuit's damages decision would be rendered moot by a subsequent decision on that issue. By contrast, in this case the district court and the Third Circuit have explicitly addressed the issues and the Third Circuit has remanded only for a determination of what additional remedies, if any, should be awarded to plaintiffs and the class. There will be no further consideration of the issues raised on this petition in the lower courts. Therefore, this petition presents the opportunity to decide these "important legal question[s]" that were not ripe when presented two years ago.

CONCLUSION

For the foregoing reasons, UNITE respectfully urges the Court to grant this petition for a writ of certiorari.

Respectfully submitted,

LAWRENCE T. HOYLE, JR.
Counsel of Record
ARLENE FICKLER
ARLEIGH P. HELFER III
JOHN R. TIMMER
HOYLE, FICKLER, HERSCHEL
& MATHES LLP
One South Broad Street
Suite 1500
Philadelphia, PA 19107
(215) 981-5700

Attorneys for Petitioner
UNITE

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 9, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 06-4522, 06-4721

ELIZABETH PICHLER; KATHLEEN F. KELLY; RUSSELL CHRISTIAN; DEBORAH BROWN; SETH NYE; HOLLY MARSTON; KEVIN QUINN; JOSE L. SABASTRO; DEBORAH A. SABASTRO; THOMAS RILEY; AMY RILEY; RUSSELL DAUBERT; CARRIE DAUBERT

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, AFL-CIO), A NEW YORK UNINCORPORATED ASSOCIATION; BRUCE RAYNOR, A NEW YORK RESIDENT; INTERNATIONAL BROTHERHOOD OF TEAMSTERS AFL-CIO, DOES 1-10

UNITE HERE,

Appellant

Argued December 6, 2007

Before: SLOVITER, CHAGARES, and HARDIMAN, *Circuit Judges.*

(Filed: September 9, 2008)

Appendix A

OPINION OF THE COURT

CHAGARES, Circuit Judge.

This case presents several issues of first impression in this court of appeals regarding application of the Driver's Privacy Protection Act of 1994 (the DPPA), 18 U.S.C. §§ 2721-2725. After certifying a class to proceed against the defendant-labor union, the District Court construed certain provisions of the DPPA and granted summary judgment to all but three of the named plaintiffs (plaintiffs). The court found that the union's labor organizing activities violated plaintiffs' privacy rights under the DPPA and awarded monetary and injunctive relief. However, the court granted the union summary judgment on plaintiffs' claims for punitive damages and dismissed the claims of the three other plaintiffs. The court deferred judgment as to class-wide relief, awaiting appellate clarification on the novel issues raised. Both sides have appealed. We will affirm in part, vacate in part, and remand for further proceedings.

I.

In the fall of 2002, the Union of Needletrades, Industrial & Textile Employees AFL-CIO (UNITE)[1]

1. In July of 2004, UNITE merged with the Hotel Employees and Restaurant Employees International Union (HERE), and the combined entity has become known as "UNITE HERE." For the sake of simplicity, we will refer to the entity that is a defendant in this case as "UNITE."

decided to launch a union organizing campaign targeting Cintas Corporation (Cintas). Cintas, the largest domestic employer in the industrial laundry industry, is philosophically opposed to unions and union organizing. UNITE was concerned with what it saw as Cintas' low wages, poor benefits, unsafe working conditions, discriminatory practices, and violations of various labor laws. The International Brotherhood of Teamsters AFL-CIO (Teamsters) already represented some Cintas employees, and the two unions therefore agreed to work together on the campaign.[2]

From its inception, a major component of the campaign to organize and unionize Cintas workers was finding potential legal claims against Cintas. UNITE sought to use litigation as a means of raising the standards in the industrial laundry industry, and to demonstrate to Cintas' employees the effectiveness and usefulness of labor organizing. UNITE believed that house calls were essential to the campaign's success because it thought workers would be reluctant to talk to union organizers at work for fear of retaliation by Cintas management. In order to contact employees, UNITE compiled lists of names and addresses of presumed Cintas workers from a variety of sources. Among these sources, UNITE used license plate numbers on cars found in Cintas parking lots to access

2. The Teamsters, however, are no longer a party to this case. The District Court approved a settlement between the Teamsters and the plaintiffs and dismissed the Teamsters from the case. *See Pichler v. UNITE*, 446 F.Supp.2d 353, 365 (E.D.Pa.2006).

information contained in state motor vehicle records relating to those license plates. This technique is known as "tagging."

Generally, UNITE organizers would enter or observe a Cintas parking lot and either write down or dictate into a tape recorder the license plate numbers on cars seen parked in, entering, or leaving the lot. The organizers would then take their lists of license plate numbers and access motor vehicle records either by using a Westlaw database or through private investigators or "information brokers." Appendix (App.) 229. The information brokers would—either directly or through intermediaries—obtain the information by applying to state motor vehicle bureaus.

Through these methods, UNITE accessed the motor vehicle records of the plaintiffs and a plaintiff class estimated by the parties to consist of between 1,758 and 2,005 Cintas employees, or relatives or friends of Cintas employees. UNITE visited the homes of many of these class members as well. During one such home visit on February 7, 2004, two women approached the house of plaintiff Kevin Quinn and rang his doorbell. When Quinn opened the door, they asked for him by name. He replied "That's me." App. 238. When the women informed him that "they were organizing a union campaign against Cintas," he told them he was not interested and shut the door. *Id.* The women returned to their car and departed.

Appendix A

In addition to Quinn, plaintiffs include other individuals employed by Cintas at all times relevant to this case—Elizabeth Pichler, Jose Sabastro, Thomas Riley, Seth Nye, and Russell Daubert.[3] Plaintiffs also include several non-Cintas employees—Russell Christian, Deborah Sabastro, Carri Daubert, Holly Marston, and Amy Riley. Russell Christian is the boyfriend and housemate of Cintas employee Kathleen Kelly (who the District Court dismissed for lack of standing).[4] Christian owns the car Kelly drives and is the person whose motor vehicle records UNITE accessed. When a UNITE organizer came to their home, he asked to speak to Christian. Holly Marston is the mother of Seth Nye, and the two co-own the car whose records were accessed (thereby obtaining the identities of both individuals). Amy Riley is Thomas Riley's wife, and they co-own the car whose records were searched as well. Deborah Sabastro and Carri Daubert are the wives of Jose Sabastro and Russell Daubert, but UNITE accessed only their husbands' motor vehicle records as their cars were registered to their husbands. The court dismissed both wives' claims for lack of standing.

---

3. The caption contains the name of one additional plaintiff—Deborah Brown. Brown stipulated to the dismissal of her claim without prejudice, and so her claim is not now before us. *See Pichler v. UNITE*, 228 F.R.D. 230, 240 (E.D.Pa.2005).

4. Unlike the District Court's finding that Deborah Sabastro and Carri Daubert lacked standing, plaintiffs have not appealed the similar dismissal of Kathleen Kelly. Appellant Br. at 49.

Appendix A

The original complaint in this case was filed on June 28, 2004. App. 27. Shortly thereafter, plaintiffs filed a one-count amended class action complaint alleging that the Teamsters, UNITE, and UNITE's President, Bruce Raynor, violated the DPPA.

On May 31, 2005, the court certified a class to proceed against UNITE, though not against Raynor, and dismissed the claims of Kathleen Kelly, Carri Daubert, and Deborah Sabastro for lack of standing. *See Pichler v. UNITE*, 228 F.R.D. 230 (E.D.Pa.2005) (*Pichler I*). On August 30, 2006, the court granted summary judgment against UNITE and awarded the plaintiffs $2,500 each, and granted summary judgment in favor of Raynor. *See Pichler v. UNITE*, 446 F.Supp.2d 353 (E.D.Pa.2006) (*Pichler II*). Pursuant to Federal Rule of Civil Procedure 54(b), the court also certified the case for appellate review, deferring the questions about class-wide and injunctive relief. Finally, on October 17, 2006, the court amended its previous judgment and granted UNITE summary judgment on the issue of punitive damages. *See Pichler v. UNITE*, 457 F.Supp.2d 524 (E.D.Pa.2006) (*Pichler III*). The court also granted separate awards to Thomas Riley and Amy Riley, co-owners of a vehicle whose records UNITE searched,[5] and permanently enjoined UNITE and its employees from using or disclosing any of the plaintiffs' personal information obtained by UNITE in violation of the DPPA. This appeal followed.

---

5. The court had already granted separate awards to co-owners Seth Nye and Holly Marston in its August 30, 2006 judgment.

Appendix A

II.

The District Court had subject matter jurisdiction over this federal question action under 28 U.S.C. § 1331. We have jurisdiction over this appeal from the final decision of the District Court pursuant to 28 U.S.C. § 1291.[6]

---

6. We agree with the parties that the District Court properly certified this case pursuant to Federal Rule of Civil Procedure 54(b). *See* 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2654 (3d ed.1998) (explaining Rule 54(b)'s goal of avoiding "the possible injustice of a delay in entering judgment . . . as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available"). There are two basic conditions on the rule's applicability: "(1) there has been a final judgment on the merits, i.e., an ultimate disposition on a cognizable claim for relief; and (2) there is 'no just reason for delay.' " *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 202 (3d Cir.2006) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7-8, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980)).

In this case, both requirements are met. The District Court granted summary judgment as to UNITE's liability under the DPPA and addressed all remedial issues except attorneys' fees—granting liquidated damages, denying punitive damages, and granting injunctive relief. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199-203, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988) (explaining that a decision on the merits is a final decision as a matter of federal law under 28 U.S.C. § 1291 even when the recoverability or amount of attorneys' fees for the litigation remains to be determined). Thus, all the rights and liabilities of UNITE, vis-a-vis the plaintiffs, have been fully

(Cont'd)

We review the District Court's construction of federal statutes *de novo*. *Chao v. Cmty. Trust Co.*, 474 F.3d 75, 79 (3d Cir.2007). We also review a grant or denial of summary judgment de novo, applying the same standard as the District Court. *Marten v. Godwin*, 499 F.3d 290, 295 (3d Cir.2007). Summary judgment is only appropriate if "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *DL Res., Inc. v. FirstEnergy Solutions Corp.*, 506 F.3d 209, 216 (3d Cir.2007). On cross-motions for summary judgment, the court construes facts and draws inferences "in favor of the party against whom the motion under consideration is made." *Samuelson v. LaPorte Cmty. Sch.*, 526 F.3d 1046, 1051 (7th Cir.2008) (quotation marks omitted). The court may not, however, weigh the evidence or make credibility determinations as "these tasks are left for the fact-finder." *Pertruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1230 (3d Cir.1993).

(Cont'd)

adjudicated and finally decided. So too, the District Court found no just reason for delaying an appeal, and explained its rationale for this finding. *See Carter v. City of Philadelphia*, 181 F.3d 339, 346 (3d Cir.1999) (requiring that district courts explain their reasons for certifying a judgment for appeal under Rule 54(b)). We find no error in the District Court's finding that there was no just reason for delay. Accordingly, the requirements of Rule 54(b) are met, and we have appellate jurisdiction over the final decision of the District Court.

Appendix A

III.

Plaintiffs contend that the District Court erred in granting defendants' summary judgment motion on the issue of punitive damages and that they were denied their Seventh Amendment right to a jury trial on that issue.[7]

A.

The parties filed cross-motions for summary judgment with the District Court, and submitted certain jointly stipulated facts for purposes of disposing of the motions. The court properly granted summary judgment as to UNITE's liability (except as noted in section V, *infra*) on the grounds that uncontroverted evidence established that UNITE acted for an impermissible purpose, in violation of the DPPA. *Pichler III*, 457 F.Supp.2d at 531.

---

7. The remedial section of the DPPA provides:

> **(b) Remedies.**—The court may award—
>
> (1) actual damages, but not less than liquidated damages in the amount of $2,500;
>
> (2) punitive damages upon proof of willful or reckless disregard of the law;
>
> (3) reasonable attorneys' fees and other litigation costs reasonably incurred; and
>
> (4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2724(b).

Regarding the issue of summary judgment on plaintiffs' request for punitive damages, however, the District Court seems to have applied an inappropriate standard. The court assumed that awarding remedies was simply "in its discretion." *Id.* at 527. Specifically, rather than determining whether there were genuine issues of material fact as to whether UNITE willfully or recklessly contravened the DPPA as § 2724(b)(2) requires, the court found that "[t]he DPPA plainly gives us the discretion to award *or* to deny punitive damages, even if UNITE violated the DPPA and did so willfully and recklessly. We must craft an appropriate award bearing in mind the purposes of the statute and the relevant jurisprudence on punitive damages." *Id.* at 531 (emphasis in original). In so doing, the court considered plaintiffs' arguments concerning UNITE's prior knowledge of the DPPA following UNITE's involvement in earlier litigation[8] and UNITE's continued use of motor vehicle information. The court also considered the fact that UNITE's legal department distributed a memorandum directing its campaigners not to use "license plate numbers to obtain any information from Department of Motor Vehicles records, including names

---

8. In *Tarkington v. Hanson and UNITE*, No. 4-00-cv-00525 JMM (E.D.Ark. Aug. 25, 2000), the plaintiffs therein alleged that UNITE obtained motor vehicle license plate numbers from vehicles parked in the Dillard's Distribution Center in Mabelvale, Arkansas, which UNITE used to obtain personal information. The parties eventually settled the case. President Bruce Raynor discussed the terms of the settlement with UNITE's counsel as it was being negotiated and Raynor executed the settlement documents on behalf of UNITE. *See Pichler II*, 446 F.Supp.2d at 364.

and addresses." *Id.* (quotation marks omitted). The court found that "this clear instruction, plus the certainty that further license plate retrievals will result in costly damages awards, will effectively deter UNITE from further violations of the DPPA. Thus, we achieve deterrence without imposing punitive damages." *Id.* at 532 (footnote omitted). The court refused to award punitive damages, deeming them "unnecessary" in this case. *Id.*

The District Court concluded that it had discretion to fashion an award, but it did not determine whether summary judgment was appropriate on the issue of punitive damages given the requirements of § 2724(b)(2). The court did not apply the standards for summary judgment, nor did it even mention summary judgment in its analysis. Furthermore, it appears that the court improperly engaged in weighing of evidence on the summary judgment record. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Bragen v. Hudson News Co.,* 278 F.2d 615, 618 (3d Cir.1960). Accordingly, we will vacate the court's denial of punitive damages and remand for the court to address explicitly whether summary judgment was appropriate on the issue of punitive damages.

B.

If, on remand, the District Court determines that summary judgment is appropriate as to plaintiffs' punitive damages claim, then a trial will be unnecessary. *In re TMI Litig.,* 193 F.3d 613, 725 (3d Cir.1999);

see Tull v. United States, 481 U.S. 412, 419, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). However, if the District Court determines that summary judgment is inappropriate, we agree with plaintiffs that they are entitled to a jury trial on their punitive damages claim, as we discuss below.

The Supreme Court has instructed that "[b]efore inquiring into the applicability of the Seventh Amendment, we must 'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.' " *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 707, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (quoting *Tull*, 481 U.S. at 417 n. 3, 107 S.Ct. 1831). It is clear that the DPPA makes no mention of a right to a jury trial. As the District Court properly observed, "[t]he DPPA does not provide for a jury trial on this (or, for that matter, any) issue." *Pichler III*, 457 F.Supp.2d at 531.[9]

9. UNITE argues that the language of the DPPA vests the *court*—not a jury—with discretion to award damages and, therefore, plaintiffs have no right to a jury trial. *See* 18 U.S.C. § 2724(b) ("The court may award . . . punitive damages. . . ."). Because "the court" can refer to the judge, the jury, or some combination of the two, we reject UNITE's argument that the language evinces Congress's clear intention to abrogate the jury trial right for punitive damages. Along these lines, the fact that the statute seems to indicate an exercise of discretion does not alter our conclusion. There is ample "historical evidence that cases involving discretionary monetary relief were tried before juries." *Feltner*, 523 U.S. at 353, 118 S.Ct. 1279. Indeed, in *Feltner*, where the language of the statute seemed to demand

(Cont'd)

Accordingly, we must engage in a Seventh Amendment analysis. *See Cox v. Keystone Carbon Co.*, 861 F.2d 390, 393 (3d Cir.1988).

The Seventh Amendment provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...." U.S. Const. amend. VII. Consistent with this textual mandate that the jury right be preserved, the Supreme Court has recognized:

> our interpretation of the Amendment has been guided by historical analysis comprising two principal inquiries: "[F]irst, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was. If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."

Del Monte Dunes, 526 U.S. at 708, 119 S.Ct. 1624 (quoting *Markman v. Westview Instruments, Inc.*, 517

(Cont'd)

discretion on the part of the trial judge ("the copyright owner may elect . . . an award of statutory damages . . . in a sum of not less than $500 or more than $20,000 *as the court considers just* . . . ." (emphasis added)), the Court held that "the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages . . . including the amount itself." *Id.* at 355, 118 S.Ct. 1279.

U.S. 370, 376, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996)) (quotation marks and citation omitted).

1.

Conducting the first inquiry, the Supreme Court has noted that "[t]he Seventh Amendment [ ] applies not only to common-law causes of action, but also to 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.' " *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348, 118 S.Ct. 1279, 140 L.Ed.2d 438 (1998) (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989)). To determine whether a statutory cause of action is more analogous to actions decided in courts of law or equity "we examine both the nature of the statutory action and the remedy sought." *Id.* It is undisputed that plaintiffs are seeking the remedy of legal relief under the DPPA. *See id.* at 352, 118 S.Ct. 1279 ("We have recognized the 'general rule' that monetary relief is legal. . . ."). We must next determine whether civil suits seeking legal relief under the DPPA are analogous to common law causes of action ordinarily decided in courts of law in the late 18th century.

The Supreme Court in *Del Monte Dunes* considered, *inter alia*, whether an action for legal relief under 42 U.S.C. § 1983 "is an action at law within the meaning of the Seventh Amendment." 526 U.S. at 709, 119 S.Ct.

1624. Recognizing that the right to a jury extends to statutory claims that did not exist at common law, the Court noted that the right inures in claims that "can be said to 'soun[d] basically in tort,' and seek legal relief." *Id.* (quoting *Curtis v. Loether*, 415 U.S. 189, 195, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974)). The Court then looked to the statute at issue and found that "there can be no doubt that claims brought pursuant to § 1983 sound in tort. Just as common-law tort actions provide redress for interference with protected personal or property interests, § 1983 provides relief for invasions of rights protected under federal law." *Id.* The Court concluded that because the § 1983 suit sought legal relief and sounded in tort, it was an action at law.

Like § 1983, the DPPA sounds in tort. Just as common-law tort actions provide redress for interference with protected personal or property interests, so too does the DPPA. The DPPA provides redress for violation of a person's protected interest in the privacy of his or her motor vehicle records and the identifying information therein. Accordingly, plaintiffs' claims for legal relief under the DPPA are analogous to common law causes of action ordinarily decided in the courts of law in the late 18th century. *Cf.* Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L.Rev. 193, 213 n. 1 (1890) (noting that "the common law has for a century and a half protected privacy in certain cases").

2.

Having established that "the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Markman*, 517 U.S. at 376, 116 S.Ct. 1384. The Supreme Court has acknowledged that "[w]e determine whether issues are proper for the jury, when possible, 'by using the historical method' . . . look[ing] to history to determine whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was adopted." *Del Monte Dunes*, 526 U.S. at 718, 119 S.Ct. 1624 (quoting *Markman*, 517 U.S. at 378, 116 S.Ct. 1384). Where an examination of history does not provide a definitive answer as to the particular issues or analogous issues, "we look to precedent and functional considerations." *Del Monte Dunes*, 526 U.S. at 718, 119 S.Ct. 1624.

The Supreme Court has made clear that, historically, the issue of punitive damages was tried to a jury in cases sounding in tort. In *Day v. Woodworth*, 54 U.S. (13 How.) 363, 14 L.Ed. 181 (1851), the Court acknowledged that decisions regarding punitive damages should be "left to the discretion of the jury" and noted that this principle was supported by "repeated judicial decisions for more than a century." *Id.* at 371; *see id.* (recognizing that issue of punitive damages has "always" been a jury question). In particular, the Court observed, "[i]t is a well-established principle of the common law, that in . . .

all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant. . . ." *Id.* Accordingly, we hold that the issue of punitive damages in cases sounding in tort (such as the DPPA) "were decided by [a] jury in suits at common law at the time the Seventh Amendment was adopted." *Del Monte Dunes*, 526 U.S. at 718, 119 S.Ct. 1624.

Even if history did not provide a definitive answer to the question of whether the issue of punitive damages should be tried by a jury, both precedent and functional considerations support our holding. First, regarding precedent, we held in *Klinger v. State Farm Mutual Auto. Insurance Co.*, 115 F.3d 230 (3d Cir.1997), that because punitive damages constituted traditional legal relief, the Seventh Amendment demanded that a jury assess whether punitive damages were appropriate in a statutory bad faith action. *Id.* at 235-36; *see also Tull*, 481 U.S. at 422, 107 S.Ct. 1831 ("Remedies intended to punish culpable individuals . . . were issued by courts of law, not courts of equity."); *Curtis*, 415 U.S. at 196, 94 S.Ct. 1005 (noting that the remedy of punitive damages "is the traditional form of relief sought in the courts of law"). Second, regarding functional considerations, "[i]n actions at law predominantly factual issues are in most cases allocated to the jury." *Del Monte Dunes*, 526 U.S. at 720, 119 S.Ct. 1624. The relevant issue in this case is whether UNITE willfully or recklessly disregarded the prohibitions of the DPPA. *See* 18 U.S.C. § 2724(b)(2). Trial issues of willfulness and recklessness are common factual issues for juries to determine. *See Metzger v.*

Osbeck, 841 F.2d 518, 521 (3d Cir.1988) ("[W]e cannot deprive plaintiffs of an opportunity to have a jury resolve the issue of [defendant]'s intent in their favor."); *United States v. House,* 524 F.2d 1035, 1045 (3d Cir.1975) (observing in tax evasion case that "question of wilfulness is uniquely for the trier of fact" and concluding that "[t]here was certainly a jury question with respect to [defendant's] wilfulness"); *see also Fargo v. City of San Juan Bautista,* 857 F.2d 638, 641 (9th Cir.1988) ("When reasonable persons may disagree as to whether particular conduct constitutes negligence, gross negligence, or recklessness, the question is one of fact to be decided by the jury.").

In sum, where there is a genuine issue of material fact regarding the willfulness or recklessness of a defendant's conduct, we hold that the Seventh Amendment requires a trial by jury on the issue of punitive damages under the DPPA.[10]

---

10. It is true, as UNITE argues, that neither the DPPA nor the Seventh Amendment limits the trial judge's traditional authority to dispose of an issue before sending it to a jury where "the evidence is uncontradicted and raises only [questions] of law." *See Tull,* 481 U.S. at 419, 107 S.Ct. 1831. This authority, however, is not so broad as to permit the judge to find facts or resolve contradictory evidence at summary judgment. *See McCabe v. Ernst & Young, LLP,* 494 F.3d 418, 424 (3d Cir. 2007).

IV.

Plaintiffs next contend that the District Court erroneously dismissed the claims of Carri Daubert and Deborah Sabastro for lack of standing. UNITE searched the motor vehicle records of their husbands—Russell Daubert and Jose Sabastro—revealing the couples' shared addresses. According to the court, as neither Carri Daubert nor Deborah Sabastro were the registered owners of the vehicles about which UNITE obtained information, they suffered no invasion of an interest that the DPPA protects, and they lack standing to sue. We agree.

Article III of the Constitution limits the "judicial Power" of the United States to the adjudication of "Cases" or "Controversies." U.S. Const. art. III, § 2. Courts enforce the case-or-controversy requirement through several justiciability doctrines that " 'cluster about Article III.' " *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C.Cir.1983) (Bork, J., concurring)). They include standing, ripeness, mootness, the political-question doctrine, and the prohibition on advisory opinions. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). "[P]erhaps the most important of these doctrines" is standing. *Allen*, 468 U.S. at 750, 104 S.Ct. 3315.

Appendix A

The "irreducible constitutional minimum" of Article III standing consists of the following three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quotation marks, footnote, and citations omitted). The main issue regarding the standing of Carri Daubert and Deborah Sabastro is whether they have suffered "an invasion of a legally protected interest" under the DPPA. *Id.* at 560, 112 S.Ct. 2130; *see Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing. . . .' ") (quoting *Linda R.S. v. Richard D.,* 410 U.S. 614, 617 n. 7, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973)).

Appendix A

The DPPA provides that a "person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action. . . ." 18 U.S.C. § 2724(a). The DPPA thus confers a cause of action to "the individual" whose personal information from their motor vehicle records is at issue. It is undisputed that Russell Daubert and Jose Sabastro had a viable cause of action under the DPPA because they were, respectively, "the individual" who was the registered owner of a vehicle about which UNITE obtained information. In contrast, neither Carri Daubert nor Deborah Sabastro were registered owners of the vehicles and, in fact, their names did not appear anywhere on the motor vehicle records. Nonetheless, in arguing that they have standing to sue under the DPPA, they focus on the fact that they share personal information—such as their addresses—with their husbands and, therefore, the personal information "pertains" to them as well. We believe that this argument reads § 2724(a) too broadly.

The DPPA protects the privacy interests of "the individual to whom the [personal] information pertains. . . ." *Id.* Notably, Congress chose to employ the singular term "the individual" in this section. To adopt Carri Daubert's and Deborah Sabastro's argument, we would have to rewrite the statute to replace "the individual" with the words " *any* individual *s.*" Taking their argument to its logical conclusion, the DPPA would grant a cause of action to anyone (*e.g.*, spouses, children,

parents, friends, other relatives) who, for instance, resides at an address improperly obtained from motor vehicle records.[11] This would be an unwarranted extension of § 2724(a).

The consent provisions in 18 U.S.C. §§ 2721(b)(11)-(13) support our singular reading of the phrase "the individual" in the DPPA. Section (b)(13), for instance, permits personal information from motor vehicle records to be disclosed upon the written consent of "the individual to whom the information pertains." *See also id.* §§ (b)(11), (12) (requiring consent of "the person to whom such personal information pertains"). If we credit plaintiffs' argument, then presumably they—or anyone—residing at their home address could consent to the release of motor vehicle records that are not their own. Put another way, under plaintiffs' argument, an extended family member or other person residing at a house would be considered any "individual to whom" the address and telephone number "pertains" and that person could consent to release the "personal information" of anyone else residing in the house. Such a result would run contrary to the DPPA's purpose of preserving the privacy rights of individuals.

---

11. Recognizing the implications of their argument, plaintiffs propose a limiting principle: a proper DPPA plaintiff must be "a relative by blood or marriage and member of the same household as the record owner." Appellee Reply Br. at 60. We reject this limitation as it finds no support in the language or history of the statute.

Our view of § 2724(a) is also supported by § 2725(3), which limits the reach of the term "personal information" to "information that *identifies* an individual. . . ." 18 U.S.C. § 2725(3) (emphasis added). We hold that individuals such as Carri Daubert and Deborah Sabastro, who are not specifically identified in a motor vehicle record, have no legally protected privacy interest under the DPPA. *See Pichler I*, 228 F.R.D. at 241 (stating that UNITE "could not have violated [their] own DPPA—protected privacy interests because the motor vehicle abstracts contain no information about them"). Because Carri Daubert and Deborah Sabastro have not suffered "an invasion of a legally protected interest," they lack standing to sue, and, accordingly, we will affirm dismissal of their claims under the DPPA.

V.

Plaintiffs' final contention on appeal is that they are entitled to cumulative liquidated damages awards.[12] Specifically, they claim that the DPPA entitles them to a separate liquidated damages award for each time UNITE "obtain[ed]" or "us[ed]" plaintiffs' personal information,[13] and that the court erred by granting

12. As plaintiffs have not argued that the District Court erred by denying them a jury trial on the issue of cumulative liquidated damages awards, we need not discuss whether plaintiffs have a right to a jury trial on this issue.

13. "Of the nine named plaintiffs, three claim they suffered two violations each and seek $5,000 per person, and six claim they suffered three violations each and seek $7,500 per person." *Pichler III*, 457 F.Supp.2d at 529.

summary judgment to UNITE on this issue despite issues of fact as to the propriety of multiple awards. Appellant Br. at 55-56.

While both parties seem to view the statutory interpretation issue as a binary one (either allowing multiple liquidated damage awards for every obtaining or use, or not), we see the statutory language as presenting a more nuanced damages scheme. There are two distinct questions: first, whether the DPPA permits a plaintiff to recover two separate liquidated damage awards because a defendant obtains and then uses plaintiff's confidential information; and second, whether the DPPA permits a plaintiff to recover multiple liquidated damage awards where a defendant has used plaintiff's confidential information on more than one occasion.

A.

As to this first question, plaintiffs point out that the DPPA is written in the disjunctive ("a person who knowingly obtains, discloses *or* uses"), and so each act of obtaining, disclosing, or using of confidential information constitutes a separate violation of the statute. Plaintiffs contend that since the mere obtaining of personal information is a violation of the DPPA entitling a plaintiff to damages and other relief "it follows that a further *use* of that information is a separate invasion of privacy and a separate violation . . . that independently entitles the victim to the relief prescribed

by section 2724(b)." Appellant Br. at 56 (emphasis in original).[14]

Merely because both obtaining and using motor vehicle information for an impermissible purpose violate the DPPA (a premise with which we agree), it does not follow that each independent violation entitles plaintiffs to a separate liquidated damages award. The key phrase for purposes of our analysis is the DPPA's provision of $2,500 in "liquidated damages." 18 U.S.C. § 2724(b)(1). The damages contemplated by the statute are not mere generic damages, *see, e.g.*, 5 U.S.C. § 552a(g)(4)(A) ("in no case shall a person entitled to recovery receive less than the sum of $1,000"), or even "statutory damages" as such, *see, e.g.*, 15 U.S.C. § 1117(d) (providing that instead of actual damages, a plaintiff may recover "an award of statutory damages in the amount of not less than $1,000 and not more than $100,000. . . ."), but rather *liquidated* damages. The District Court noted correctly that "Congress's decision to use the technical term 'liquidated damages' in the DPPA suggests that it intended to incorporate the locution's well-understood meaning." *Pichler I*, 228 F.R.D. at 244. This "well understood meaning" undermines plaintiffs' position.

Under the common law of contracts, liquidated damages reflect an *ex ante* agreement of the parties.

---

14. Plaintiffs do not argue, however, that mailings in connection with the *Veliz v. Cintas* litigation count as separate uses. *Pichler III*, 457 F.Supp.2d at 529. *Veliz* was one of six federal cases UNITE brought or assisted in bringing against Cintas from 2002 through October 13, 2004. App. 232-34.

See E. Allan Farnsworth, *Contracts* § 12.18 (4th ed.2004) (quoting *Banta v. Stamford Motor Co.*, 89 Conn. 51, 92 A. 665, 667 (1914) ("The standard of measure here is not furnished by the plaintiff's actual loss or injury, as the event proved, but by the loss or injury which might reasonably have been anticipated at the time the contract was made. . . . It is the look forward and not backward that we are called upon to take. . . .")); *see also In re Plywood Co.*, 425 F.2d 151, 154 (3d Cir.1970) (describing liquidated damages under New Jersey law as "the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damage that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs") (quotation marks and citation omitted).[15] To incorporate the meaning of the term, we construe the DPPA with an eye toward the "loss or injury which might reasonably have been anticipated." *Banta*, 92 A. at 667.

Congress clearly contemplated that in most cases, a defendant who obtained motor vehicle information would put it to some use. *See Pichler III*, 457 F.Supp.2d at 530 ("Congress surely understood that the usual case would involve at least one instance of 'obtain[ing]' and one 'use[ ],' and it decided that a plaintiff who did not or could not show actual damages could nevertheless receive $2,500."). Therefore, given Congress's use of the

15. In this case, of course, we have an artificially-constructed "contractual" arrangement: rather than the parties themselves agreeing on liquidated damages, Congress has forecast how these damages would likely be fixed.

term "liquidated damages" and the $2,500 amount provided, we conclude that this amount encompasses both aspects of a defendant's "breach" of the DPPA—one instance of obtaining and one of use—and that the defendant is limited to one liquidated damage award in this situation. A contrary holding would effectively result in a minimum award of $5,000 for every violation of the DPPA—a result we do not believe Congress intended.

In response, plaintiffs contend that this result would incentivize a defendant who has already obtained information to then use it. This argument is unpersuasive. To begin with, the DPPA provides for criminal liability, which should deter someone who has obtained confidential information from calling attention to his or her criminal conduct by using it. *See Gen. Instrument Corp. of Delaware v. Nu-Tek Elecs. & Mfg., Inc.*, 197 F.3d 83, 95 (3d Cir.1999). Moreover, plaintiffs are free to elect actual, rather than liquidated damages, and will certainly do so in appropriate cases. *See id.*[16] Further still, the DPPA permits the award of punitive damages if the standard set forth in § 2724(b)(2) is met.

16. In a case involving stalking, for example, the obtaining of information might cause very little actual damage, while the use of such information is where the actual damages would lie.

B.

While we understand Congress to have forecast "liquidated damages" as $2,500 for the most likely violation of the DPPA (obtaining and using confidential information), there is no reason to think that such an amount covers all subsequent violations as well. The plain language of the statute contains no such restriction. *See* 18 U.S.C. § 2724(a). Accordingly, defendants can face additional damages if, after obtaining a plaintiff's personal information in violation of the DPPA, they repeatedly use or disclose that personal information.

The language of the DPPA indicates a certain degree of discretion granted to the court in awarding damages. *See* 18 U.S.C. § 2724(b) ("The court *may* award") (emphasis added); *see also Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209, 1216-17 (11th Cir.2005) ("The use of the word 'may' suggests that the award of any damages is permissive and discretionary. 'This common-sense principle of statutory construction is by no means invariable . . . [but s]ince there is neither legislative history nor obvious inferences from the structure that suggests a contrary intent, we conclude that the use of the word 'may' implies a degree of discretion. Thus, the district court, in its discretion, may fashion what it deems to be an appropriate award.' ") (citations omitted). Given the discretionary language in the statute and that the statute contains no limitation on the ability of the district court to grant cumulative awards, we construe the DPPA to permit a district court

to grant such awards upon multiple uses or disclosures of confidential information.

In this case, there appears to be evidence of multiple uses of personal information in the summary judgment record, but the District Court had a view that differed from ours regarding multiple uses or disclosures. The court did acknowledge that multiple awards of damages might be appropriate in cases where, for instance, a DPPA violator "bombarded" a plaintiff with visits and mailings. *Pichler III*, 457 F.Supp.2d at 530 n. 6. However, the court determined that the record did not suggest such a "gross disregard" of a plaintiffs' privacy rights. As a result, the court, relying upon its "Congressionally-authorized discretion," awarded $2,500 to each plaintiff. *Id.* at 530-31.

While the District Court, when all is said and done, has discretion under the DPPA to fashion an award it deems appropriate, it must address the outstanding issue of liability regarding multiple uses of personal information. The District Court must determine whether there is sufficient evidence of multiple uses to proceed beyond summary judgment. Given our construction of the DPPA and the fact that the District Court did not appear to have applied the standards for summary judgment, we will vacate its grant of summary judgment as to this issue and remand for the District Court to address explicitly whether summary judgment was appropriate on this issue.

Appendix A

VI.

UNITE's first contention as cross-appellant addresses the District Court's finding of liability. UNITE claims that the court found it to have obtained plaintiffs' personal information "for a purpose not permitted" under the DPPA only by erroneously construing the DPPA's "permissible uses" of personal information.

The DPPA is structured such that § 2721(a) provides the general prohibition on the release and use of motor vehicle information, and § 2721(b) enumerates fourteen specific exceptions to the general prohibition. UNITE claims there are two exceptions which make its tagging activities permissible: the "litigation exception" and the "acting on behalf of the government" exception. *See* 18 U.S.C. §§ 2721(b)(1), (4).[17] The District Court

17. The statutory text provides:

> **(b) Permissible uses.**—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, . . . and, subject to subsection (a)(2), may be disclosed as follows:
>
> (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.
>
> . . .

(Cont'd)

carefully analyzed the applicability of both exceptions and concluded that UNITE's activities did not fall within either. *Pichler II,* 446 F.Supp.2d at 368-71.

We need not address the District Court's interpretation of the litigation and the acting on behalf of the government exceptions as we agree with the District Court that the language of the statute is clear: "The Act contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose." *Id.* at 367 ("[I]f UNITE had three purposes for 'obtain[ing], disclos[ing] or us[ing] [plaintiffs'] personal information' and two of those were 'permissible uses' but the third was not, UNITE would still be liable for the third purpose."). Because UNITE obtained and used the confidential information for an impermissible purpose—union organizing—it does not matter what other permissible purpose UNITE may have had.

UNITE advances a unique argument. It claims that its labor-organizing purpose may not be severed from

---

(Cont'd)

> (4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. §§ 2721(b)(1), (4).

either its litigation purpose or its acting on behalf of the government purpose. For instance, UNITE contends that its

> emphasis on litigation had a twofold purpose: raising the standards in the industry for the benefit of UNITE's members, whether or not employed by Cintas, and demonstrating to Cintas' employees the effectiveness and usefulness of organization. Thus, UNITE's activity in investigating potential litigation was part and parcel of its unionizing campaign, not separate and distinct from it.

Appellee Br. at 32.[18]

The litigation component to UNITE's campaign should not obscure what UNITE was trying to accomplish—organizing labor. The same may be said for its acting on behalf of the government purpose. UNITE candidly admits that it launched the "campaign to organize and unionize Cintas workers." App. 226. Moreover, the organizers themselves, in conducting their home visits, unambiguously explained that they were "organizing a union campaign against Cintas."

---

18. Our dissenting colleague relies upon a quotation from *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King & Stevens, P.A.*, 525 F.3d 1107 (11th Cir.2008), that regards the litigation exception. *See* Dissent at 401-02 (quoting *Thomas*, 525 F.3d at 1115 n. 5). We note that the *Thomas* court explicitly rejected as waived the argument to which that quote pertained and, thus, the quote constitutes dicta.

App. 238. Regardless of UNITE's attempts to mask this clear labor-organizing purpose behind the veil of a litigation purpose or an acting on behalf of the government purpose, Congress has not permitted UNITE to do so.

The statute clearly prevents obtaining or using personal information "for a purpose not permitted under this chapter. . . ." 18 U.S.C. § 2724(a). It does not ask whether "litigation has become an increasingly important organizing tool" because "unions have found increasing resistance and difficulty using traditional organizing tactics." Appellee Br. at 31-32. The DPPA lists fourteen permissible purposes in § 2721(b) and union organizing is not one of them. *Pichler II*, 446 F.Supp.2d at 367 ("As we have already held, we will not engraft upon the DPPA a 'labor exception' that would permit unions to acquire and use employees' personal information, obtained from motor vehicle records, to contact them during organizing campaigns.").[19] Like the

19. At oral argument, UNITE raised an alternative argument suggesting that the Court engage in a "primary" versus "secondary" purpose analysis under the DPPA in an attempt to escape liability. UNITE failed to raise this argument at all before the District Court or in any of the briefs before this Court, and only raised the argument for the first time during oral argument. Despite the dissent's comments to the contrary, we will consider this argument waived and will not address it. *See Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 202-03 (3d Cir.2004) ("We have held on numerous occasions that '[a]n issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue will not suffice to bring that issue before this court.' ") (quoting *Laborers' Int'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir.1994)).

District Court, we decline to recognize an exception to the statute for which Congress has not provided.[20]

Accordingly, we will affirm the judgment of the District Court finding that UNITE obtained and used personal information for a purpose not permitted by the DPPA.

VII.

UNITE's second argument—that civil liability requires a defendant *knowingly* obtain or disclose personal information for a use the defendant *knows* is impermissible—is patently without merit. Citing the similar language of §§ 2722 and 2724 of the DPPA, UNITE contends that the District Court erred in holding that the standard of civil liability—unlike the standard for criminal liability—"does not require proof that a defendant had any appreciation that its conduct was impermissible." Appellee Br. at 37-38.

This double-knowledge requirement simply does not fit into the DPPA's statutory scheme.[21] The provisions

20. To hold otherwise would be to permit any union, or indeed any law firm, to access the DMV information of individuals at nearly any large company. Such companies are often involved in, or at least susceptible to, litigation of some sort. If this legal exposure was the only criterion necessary to render an entity's activities investigations in anticipation of litigation, the DPPA's privacy protections would mean very little.

21. In addition to our analysis set forth in the text, we concur with the District Court's analysis concerning the location of the (Cont'd)

of §§ 2722(a) and 2724(a) that UNITE claims to be identical can be read consistently. Section 2722(a) by itself does not create civil or criminal liability. It merely describes what conduct is wrongful under the DPPA. Section 2724(a), in turn, provides the standard for civil liability. Section 2723 provides the standard for criminal fines.

Congress' structuring of the DPPA—specifically, the interplay amongst its recitation of unlawful acts, civil penalties, and criminal penalties—is not unique. For instance, 18 U.S.C. § 842(a), like 18 U.S.C. § 2722, provides that "[i]t shall be unlawful for any person" to commit certain acts or omissions violative of the Controlled Substances Act. Section 842(c)(2), like 18 U.S.C. § 2723(a), creates criminal liability for violating those acts or omissions "knowingly." Section 842(c)(1), like 18 U.S.C. § 2724(a), creates civil liability for violating those acts or omissions, but does not premise civil liability on knowing violations. In fact, as we recognized in *United States v. Green Drugs*, 905 F.2d 694 (3d

(Cont'd)

adverb "knowingly" within § 2724(a). Restating its explanation, § 2724(a)'s first two clauses describe the act that subjects a defendant to civil liability (obtaining, disclosing, or using personal information from a motor vehicle record), while the third clause limits liability to acts done for "a purpose not permitted under this chapter." *Pichler I*, 228 F.R.D. at 241-42. "If Congress had intended for 'knowingly' to refer not only to the act element but also to the purpose element—so as to proscribe only those acts done for a purpose not 'knowingly' permitted—it would have been odd to locate the word 'knowingly' " so removed from the purpose element. *Id.* at 242.

Cir.1990), the strict liability standard is applicable for civil violations of section 842(a).[22] Analyzing the statute, we noted this disparity in standards, observing that violation of 21 U.S.C. § 842(a) "subjects an offender to civil or penal penalties, depending on whether the act was committed knowingly." *Id.* at 695-96. We observed further that "Congress, therefore, plainly differentiated between civil and criminal violations of [§ 842(a)], implementing different standards of fault." *Id* at 697. Similarly, here, we hold that Congress differentiated between a knowing acquisition, disclosure, or use to establish civil liability, and any knowing violation to establish liability for a criminal fine.

Moreover, UNITE's reading of the DPPA is incomprehensible given the statute's punitive damages provision. Section 2724, as stated earlier, provides a civil cause of action against "a person who knowingly obtains, discloses or uses personal information . . . for a purpose not permitted" under the statute. 18 U.S.C. § 2724(a). The DPPA continues that while the "court may award" actual damages, it may award punitive damages only "upon proof of willful or reckless disregard of the law." 18 U.S.C. § 2724(b)(2). According to UNITE, however, there is no violation of the statute absent evidence "that a defendant appreciated the illegality of his conduct," Appellee Br. at 37-38, thus making every single violation one for which punitive damages would apply. UNITE tries to save this argument by noting that "liability for

22. In 1998, 21 U.S.C. §§ 842(5) and (10) were amended to add the word "negligently."

compensatory damages would be proper on proof that a party appreciated it was engaging in wrongful conduct, but punitive damages would be reserved for those instances where a party knew it was violating the law or recklessly disregarded its obligations under the law." Appellee Reply Br. at 21. We cannot conceive of what willful or reckless disregard for the DPPA could be other than where a "party appreciated it was engaging in wrongful conduct" under the DPPA.

Accordingly, we will affirm the judgment of the District Court on this issue.

VIII.

UNITE's final argument as cross-appellant addresses plaintiffs' burden to recover liquidated damages under the DPPA. According to UNITE, the District Court erroneously construed § 2724(b), permitting plaintiffs to recover liquidated damages without showing some measure of actual damages. We disagree.

UNITE begins its argument by noting—correctly—that we must focus upon the plain language of the statute and if the statute is unambiguous, our inquiry begins and ends with the statutory text. Appellee Br. at 48 (citing *BedRoc Ltd., LLC. v.United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004)). We agree with UNITE that the language of § 2724(b) is unambiguous, but we disagree about its meaning.

As we understand the plain meaning of the provision, the two phrases therein grant, and then limit, the authority of the court in awarding damages. Simply put, the first phrase ("The court may award-actual damages") is a grant of authority to the court—it enables the court to award actual damages, however high they might be. The second phrase ("but not less than liquidated damages . . ."), then, limits that authority on the low end of the scale, creating a damage award floor. While the court may award actual damages, it may not grant an award "less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724(b)(1). But the first clause does not affect the baseline award of liquidated damages in the amount of $2,500 for *any* DPPA violation that the District Court chooses to compensate. In other words, the second phrase creates a base amount below which the court may not go, whether the plaintiff is able to prove actual damages or not.

Indeed, the Court of Appeals for the Eleventh Circuit, considering the identical issue now before us, arrived at the same conclusion as we reach here. *See Kehoe v. Fidelity Fed. Bank & Trust,* 421 F.3d 1209 (11th Cir.2005). The court in *Kehoe* began its analysis by reviewing the text of § 2724 and determined that "[t]here is no language in sub-section (b)(1) that confines liquidated damages to people who suffered actual damages." *Id.* at 1213. Instead, the court held that the second phrase of § 2724(b)(1) is not dependent upon proof of actual damages, but rather that the two clauses are to be read in the disjunctive: a plaintiff "may receive the greater of his actual damages or $2,500.00." *Id.* The

court concluded that "[h]aving considered the plain text of the DPPA's remedial provision . . . a plaintiff need not prove actual damages to recover liquidated damages." *Id.* at 1216.

The Supreme Court's opinion in *Doe v. Chao*, 540 U.S. 614, 124 S.Ct. 1204, 157 L.Ed.2d 1122 (2004), and the common law of privacy support this understanding of the plain language as well. In *Doe*, the Supreme Court considered the issue of whether the Privacy Act requires that plaintiffs prove actual damages to qualify to receive statutory damages. The Court ruled in the affirmative, but the difference between the Privacy Act and the DPPA, as well as the Court's broader analysis, actually support our holding to the contrary here.

Unlike the DPPA, the Privacy Act contains language providing that the defendant is liable for "actual damages sustained by the individual as a result of [certain agency conduct] . . . , but in no case shall *a person entitled to recovery* receive less than the sum of $1,000." 5 U.S.C. § 552a(g)(4)(A) (emphasis added). Accordingly, "the simplest reading of that phrase looks back to the immediately preceding provision for recovering actual damages." *Doe*, 540 U.S. at 620, 124 S.Ct. 1204. Only a "person entitled to recovery" of actual damages can qualify for a statutory damage award. The DPPA, however, contains no such "critical limiting" language, *id.* at 626, 124 S.Ct. 1204, suggesting that a person need not prove actual damages to receive liquidated damages.

Further support for our construction of § 2724(b)(1) comes from the common law of privacy. As the Court in *Doe* pointed out, unlike common law negligence actions, the common law provided privacy tort victims with a monetary award calculated without proving actual damages. *See Doe,* 540 U.S. at 621 n. 3, 124 S.Ct. 1204 (quoting 4 Restatement of Torts § 867 cmt. d (1939)) (noting that damages are available for privacy tort victims "in the same way in which general damages are given for defamation," without proof of "pecuniary loss [or] physical harm"); *Parks v. Internal Revenue Serv.,* 618 F.2d 677, 683 (10th Cir.1980) (observing that the "common law tort of invasion" seeks to remedy "personal wrongs which result in injury to plaintiffs' feelings and are actionable even though the plaintiff suffered no pecuniary loss nor physical harm"); *Nolley v. County of Erie,* 802 F.Supp. 898, 904 (W.D.N.Y.1992); *Bolduc v. Bailey,* 586 F.Supp. 896, 902 (D.Colo.1984). Courts permit recovery in privacy cases without proving actual damages because it is difficult to prove damages in such cases. *See Nolley,* 802 F.Supp. at 904 (stating that although violation of the right to privacy "is virtually certain to cause some injury . . . the type of injury [ ] is very difficult to prove"); *Fairfield v. Am. Photocopy Equip. Co.,* 138 Cal.App.2d 82, 291 P.2d 194, 198 (1955) ("The fact that damages resulting from an invasion of the right to privacy cannot be measured by a pecuniary standard is not a bar to recovery.").[23] As the court in *Kehoe* correctly concluded:

---

23. While the majority in *Doe* deviated from the common law understanding just explained, it did so based on various

(Cont'd)

> Damages for a violation of an individual's privacy are a quintessential example of damages that are uncertain and possibly unmeasurable. Since liquidated damages are an appropriate substitute for the potentially uncertain and unmeasurable actual damages of a privacy violation, it follows that proof of actual damages is not necessary for an award of liquidated damages.

421 F.3d at 1213.

Finally, as discussed above in a different context, *see* section V, *supra*, the inclusion of the phrase "liquidated damages" supports the conclusion that the plain language of the DPPA aims to compensate not just those violations that can be shown to have caused actual damages. Liquidated damages have long been used as a substitute for actual damages in situations where "damages are uncertain in nature or amount or are

---

(Cont'd)

facts and circumstances not present in this case. Besides the "critical limiting" language of the Privacy Act, the "drafting history show[s] that Congress cut out the very language in the bill that would have authorized any presumed damages." *Doe*, 540 U.S. at 622, 124 S.Ct. 1204. In addition, as the Privacy Act involved a waiver of sovereign immunity, its construction followed the principle that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981) (citation omitted); *see United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995).

unmeasurable." *Rex Trailer Co. v. United States*, 350 U.S. 148, 153, 76 S.Ct. 219, 100 L.Ed. 149 (1956). Further, we have just observed that the damages flowing from privacy violations have historically been considered "quintessential example[s] of damages that are uncertain and possibly unmeasurable." *Kehoe*, 421 F.3d at 1213. We believe it would make little sense, as a matter of statutory construction, for Congress to have inserted the phrase "liquidated damages" into § 2724(b)(1) if the only compensable violations of the DPPA were those for which the damages could be calculated precisely. Indeed, such an interpretation would violate our duty to give effect to each word of the statute. *See Pa. v. United States Dep't of Health & Human Servs.*, 928 F.2d 1378, 1385 (3d Cir.1991).

The plain language of the DPPA, Supreme Court and other precedent, and the common law of privacy all support construing § 2724(b) so as not to require actual damages to recover liquidated damages. Accordingly, we will affirm the District Court's judgment on this issue.

IX.

For the foregoing reasons, we will affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

Appendix A

SLOVITER, Circuit Judge, dissenting.

Congress took an important step in protecting the privacy of drivers when it enacted the Driver's Privacy Protection Act ("DPPA" or "Act") in 1994. That Act prohibits the disclosure and resale of the personal information, defined as, inter alia, the name, address, telephone number and social security number, that a prospective licensee must disclose to the state motor vehicle department in order to secure a driver's license unless the disclosure and/or use falls within one of the fourteen enumerated statutory exceptions. *See* 18 U.S.C. § § 2721-2725.

The impetus for the Act is clear from the legislative history. A television actress in California who had an unlisted home number and address "was shot to death by an obsessed fan who obtained her name and address through the DMV." *See* 140 Cong. Rec. 7,924-25 (1994). In Tempe, Arizona, "a woman was murdered by a man who had obtained her home address from that State's DMV." 139 Cong. Rec. 29,466 (1993). The Senate debate focused on the need to protect the privacy of persons from stalkers and potential criminals. *See id.* at 29,469. At that time, personal information was easily available from 34 states' DMVs. *Id.* at 29,466.

Interestingly, although the debates in the House of Representatives and Senate were devoted to privacy issues, the commentary following the passage of the DPPA focused on the 10th and 11th Amendments and what many commentators viewed as the Act's clash with

principles of federalism. The expressed concern was that the federal government was mandating certain actions by the states. *See Condon v. Reno*, 155 F.3d 453, 456 (4th Cir.1998) (holding that "Congress lacked the authority to enact the DPPA under either the Commerce Clause or Section 5 of the Fourteenth Amendment"), *rev'd* 528 U.S. 141, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000). The Supreme Court's unanimous decision in *Reno v. Condon*, 528 U.S. 141, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000), which held that in enacting the DPPA Congress did not run afoul of federalism principles and sustained the DPPA under Congress' authority to regulate interstate commerce put an end to that debate. Because the Court limited its discussion to the federalism issue, it did not discuss either the scope of the privacy interest to which the DPPA is directed or any of the details of the Act to which the majority directs its opinion.

The holding of the majority with which I disagree is confined to its agreement with the District Court that even if UNITE obtained and used driver information for one of the purposes expressly permitted by the DPPA, it violated the statute if it also had a purpose not expressly permitted. As the majority recognizes, UNITE argued that "a major component of the campaign to organize and unionize Cintas workers was finding potential legal claims against Cintas." Maj. Op. at 383. The statute expressly exempts from its prohibitions "use in connection with any civil criminal, administrative, or arbitral proceeding in our Federal, State, or local court or agency or before any self-

regulatory body, including the service of process, *investigation in anticipation of litigation,* and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State or local court." 18 U.S.C. § 2721(b)(4) (emphasis added). The majority does not suggest that it doubts that UNITE did in fact have this objective. In its brief, UNITE lists various legal actions that it and/or Cintas employees filed against Cintas, including a class action alleging FLSA violations concerning drivers' overtime pay, an action in California for violations of living wage ordinances, a complaint with the EEOC alleging Cintas discriminated on the basis of race, color, sex, and national origin and subsequently a class action in federal court in which the EEOC intervened as a plaintiff. Appellee's Br. at 13-14. It also states that "[d]ozens of additional lawsuits and administrative actions were commenced before the EEOC, OSHA, NLRB, and other agencies." *Id.* at 14.

The District Court held, and the majority agrees, that because UNITE conceded that it also accessed the motor vehicle records for the purpose of organizing workers, and union organizing is not listed a permissible purpose, the use of names and addresses of Cintas employees for that purpose violated the DPPA as a matter of law. *Pichler v. UNITE*, 446 F.Supp.2d 353, 368 (E.D.Pa.2006). I disagree.

In the first place, there is ample basis in the record to substantiate UNITE's assertion that it had the purpose of investigating legal claims against Cintas. Indeed, the District Court's opinion notes that UNITE

prepared a 132-page "Legal Training Laundry Campaign" document that its attorneys and outside counsel used to train the twelve UNITE members who were the lead organizers for the regions where UNITE would kick off its campaign. *Pichler*, 446 F.Supp.2d at 357. The training covered such topics as the Fair Labor Standards Act, the Family Medical Leave Act, various types of discrimination, unfair labor practices, and workers' compensation. *Id.*

That such training would be useful can be gleaned from the statement in the District Court opinion that many employees working at the 350 Cintas locations are either female, black, or Hispanic. *Id.* at 355. Although neither the District Court nor the majority has so stated, I assume that not many of the 28,000 Cintas employees are well informed about their rights and UNITE may very well have a basis for instituting legal or administrative actions on behalf of the Cintas employees at issue in this case as it has done in other locations.

The District Court's view of the "investigation in anticipation of litigation" clause in § 2721(b)(4) was a narrow one. It asserted that "the Unions must prove that (1) they undertook an actual investigation; (2) at the time of the investigation, litigation appeared likely; and (3) the protected information obtained during the investigation would be of 'use' in the litigation," which "implies a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding." *Pichler v. UNITE*, 339 F.Supp.2d 665, 668 (E.D.Pa.2004). The Court concluded that UNITE was

"finding" claims, rather than investigating them, and that litigation was not "likely" where only thirty-one of 1758 to 2005 putative class members' information had led or was leading to litigation. *Pichler*, 446 F.Supp.2d at 369.

A recent decision of the Court of Appeals for the Eleventh Circuit offers a starkly different interpretation of § 2721(b)(4). Honing in on the clause allowing "investigation in anticipation of litigation," that court stated that "even if the accumulation of potential witnesses related, in part, to certain cases not yet filed, we do not see how pre-suit investigation can be considered per se inapplicable to the litigation clause." *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107, 1115 n. 5 (11th Cir.2008). The court concluded that a law firm's retrieval of 284,000 motor vehicle records, *id.* at 1109, "used to send one-thousand 'Custom and Practice' letters, which aimed at obtaining evidence showing a custom or practice of deceptive acts engaged in by [car] dealerships," *id.* at 1114, was a permissible use of the information in those records. *Id.* at 1115.

I would adopt the Eleventh Circuit's interpretation of § 2721(b)(4). The provision is written broadly. It allows the use of personal information from motor vehicle records "in connection with" a wide range of litigation activities, including "the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders. . . ." 18 U.S.C. § 2721(b)(4). UNITE produced evidence that because

it was aware of litigation against Cintas, it sought and obtained evidence of related legal violations during its home visits, and that it used that information to bring a considerable number of allegations before state, federal, and administrative adjudicatory bodies. *See supra* at pp. 384-85. In light of this evidence, there can be little doubt that at least one of UNITE's purposes for using the restricted information was in connection with investigation in anticipation of litigation.

Furthermore, it is important to note that there is nothing illegal about efforts to organize a union. It is one of the activities protected by our labor laws. *See* National Labor Relations Act § 7, 29 U.S.C. § 157 ("Employees shall have the right to . . . form, join, or assist labor organizations. . . ."). There is no indication that the need to obtain names and addresses of employees for the purpose of unionization was ever brought to Congress' attention when it drafted the DPPA. We cannot speculate whether it would have added this as one of the enumerated permissible uses had the labor unions expressed their views. We do know, from the vignette included in the majority opinion, that the UNITE organizers did not engage in harassing the employees whose addresses they had obtained. The majority states that when two women rang the doorbell of Kevin Quinn and told him they were organizing, he told them he was not interested and they departed. Although they did nothing more offensive than ring his doorbell, he became a named plaintiff and, under the opinion of the District Court affirmed by the majority, will be entitled to $2,500. UNITE also calls to our

attention record evidence that all union representatives who made home visits in connection with the campaign acted politely and left without conversation when asked to do so. Appellee's Br. at 15-16.

The majority cites no legislative history to support its conclusion that the presence of one unlisted purpose for obtaining the motor vehicle information overrides or cancels a listed purpose. When such cases are presented, I would adopt the approach courts have historically used in situations where there are multiple purposes and have the fact-finder determine which is the primary purpose and whether that purpose was permitted under § 2721(b). *Cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (noting that Title VII requires plaintiff to prove that "race, color, religion, sex, or national origin was a motivating factor" for the challenged employment practice); *Comm'r of Internal Revenue v. Groetzinger*, 480 U.S. 23, 35, 107 S.Ct. 980, 94 L.Ed.2d 25 (1987) (whether income arises from a business or trade under the Internal Revenue Code requires determination that "the taxpayer's primary purpose for engaging in the activity must be for income or profit").

I recognize the significance of the majority's footnote stating that UNITE waived any argument that we should analyze whether its purpose was primary or secondary because it failed to raise the argument in the District Court or in any of the briefs filed in this court. I do not minimize the force of that argument, but note that because our interpretation of this statute will set

the boundaries of civil liability under the DPPA in this circuit, I would apply our precedent and exercise our discretion to consider the argument notwithstanding the waiver. *See Loretangeli v. Critelli*, 853 F.2d 186, 189 n. 5 (3d Cir.1988) ("This court may consider a pure question of law even if not raised below where refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance.").

In summary, I would reverse the District Court's grant of summary judgment for plaintiffs on liability and would remand so that a jury could decide whether UNITE's primary purpose in obtaining and using the information gleaned from motor vehicle records was to receive information from Cintas employees about potential legal violations, an expressly protected activity.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 17, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 04-2841

ELIZABETH PICHLER, et al.

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES AFL-CIO)

MEMORANDUM

Dalzell, J. October 17, 2006

Before us now is plaintiffs' motion to amend the August 30, 2006 Judgment (the "Judgment"), and the parties' briefs on this matter, filed pursuant to our Order of September 20, 2006, wherein we instructed them to address various issues concerning remedies.

I. *Background*

On August 30, 2006, we held that UNITE HERE ("UNITE") had violated the Driver's Privacy Protection Act of 1994 ("DPPA" or the "Act"), and therefore

granted judgment in favor of the named plaintiffs and against UNITE as to liability. *See Pichler v. UNITE*, 446 F.Supp.2d 353 (E.D.Pa.2006). We also certified the case for appeal pursuant to Fed.R.Civ.P. 54(b).[1] *See id.* at 372-73. In a letter submitted to the Court on September 7, 2006, plaintiffs contend that under *Sussex Drug Products v. Kanasco, Ltd.*, 920 F.2d 1150 (3d Cir.1990), and its progeny, the Judgment is not "final" for purposes of a Rule 54(b) appeal because we have

---

1. Federal Rule of Civil Procedure 54(b) provides that "when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the . . . parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." In our August 30 decision, we expressly found "no just reason" to delay entry of judgment in favor of the named plaintiffs and against UNITE. We also stated our reasons for doing so, namely that this class action presents novel questions in need of appellate clarity before we begin the costly, complex and cumbersome process of class-wide relief. *See Carter v. City of Philadelphia*, 181 F.3d 339, 346 (3d Cir.1999) (holding that district courts should explain their reasons for certifying a judgment for appeal under Rule 54(b), though failure to do so is not a jurisdictional bar for the appellate court). Other relevant factors also weigh in favor of a Rule 54(b) certification. *See Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3d Cir.1975) (offering illustrative list of factors court may consider). For instance, because the exact size and membership of the class has yet to be determined, the claims of the named plaintiffs are readily separable from those of the putative class members. *See id.* Also, in any appeals that may follow imposition of class-wide relief, the Court of Appeals will not have to revisit the issues of first impression in this Circuit that it would resolve on a Rule 54(b) appeal now. *See id.*

not yet resolved all of the remedial issues as to the named plaintiffs.

We notified the parties that we would treat plaintiffs' letter as a motion to amend the Judgment pursuant to Fed.R.Civ.P. 59(e). *See* Order of Sept. 20, 2006 and attached Letter of Sept. 7, 2006. To remove any uncertainty as to our Court of Appeals's jurisdiction over an appeal on the Judgment in favor of the named plaintiffs and against UNITE, we shall now resolve the open remedial issues as they concern these plaintiffs.

II. *Remedies*

Plaintiffs seek three forms of relief: statutory damages, punitive damages, as well as an injunction. They also ask that the Judgment specify that they may file a request for attorneys' fees and costs if they prevail after exhaustion of appeals.[2]

The DPPA's remedies for civil actions are set forth in 18 U.S.C. § 2724, which provides:

> **(a) Cause of action.**—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter

---

2. We have already granted plaintiffs' unopposed request for such timing for any bill of costs and application for attorneys' fees. *See* Order of Sept. 20, 2006. To make clear that we have addressed all of the named plaintiffs' requested forms of relief, however, we shall amend the Judgment to include this provision.

> shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.
>
> **(b) Remedies.**—*The court **may** award*—
>
> (1) actual damages, but not less than liquidated damages in the amount of $2,500;
>
> (2) punitive damages upon proof of willful or reckless disregard of the law;
>
> (3) reasonable attorneys' fees and other litigation costs reasonably incurred; and
>
> (4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2724 (emphasis added).

The plain language of Section 2724—"the **court** may award"—leaves no doubt that Congress gave *district courts* the discretion to *grant* ***or*** *deny* each of the remedies. As the Eleventh Circuit has explained:

> [T]he district court, in its discretion, may fashion what it deems to be an appropriate award. Among the options for the district court is the option to award "actual damages, but not less than liquidated damages in the amount of $2,500." In fashioning an appropriate award, the district court may also

> consider the other forms of relief that are available and were requested by [the plaintiff]—punitive damages, reasonable attorney's fees and costs, and the destruction of all of [plaintiff's] personal information illegally obtained from motor vehicle records.

Kehoe v. Fidelity Federal Bank & Trust, 421 F.3d 1209, 1217 (11th Cir.2005), *cert. denied*, 547 U.S. 1051, 126 S.Ct. 1612, 164 L.Ed.2d 353 (2006). We now consider the facts of this case in order to "fashion . . . an appropriate award."

A. *Statutory Damages*

In the Judgment, we awarded each named plaintiff $2,500 in statutory damages, with the exception of Thomas Riley and Amy Riley, to whom we granted a single statutory damages award of $2,500 because they are married co-owners of the vehicle whose license plate UNITE searched.[3] The parties now contest how the statutory damages are properly calculated. We first turn to their arguments concerning the relevance of a vehicle's title, and then consider how statutory damages should be assessed for each plaintiff.

---

3. A tenancy by the entireties "exists when property, either real or personal, is held jointly by a husband and wife, with its essential characteristic being that each spouse is seised of the whole or the entirety and not a divisible part thereof." *Clingerman v. Sadowski*, 513 Pa. 179, 519 A.2d 378, 380 (1986) (footnote omitted).

Appendix B

1. *Co-ownership of vehicles*

The parties disagree as to whether joint owners of a vehicle are each entitled to a separate statutory damages award of $2,500 or whether they must share that award. This issue affects four named plaintiffs: husband and wife Thomas Riley and Amy Riley who co-owned a car, and mother and son Holly Marston and Seth Nye who co-owned a car. UNITE searched these jointly-owned cars' license plates and thereby obtained the identities of these four named plaintiffs.

Plaintiffs argue that the DPPA's focus is protecting privacy, not property, so co-ownership of vehicles is immaterial for purposes of calculating damages awards. Likewise, they contend that the relationship between any given co-owners is irrelevant. In particular, they assert that Thomas Riley and Amy Riley, who own their car as tenants by the entireties, each enjoys a right to privacy of his or her "personal information."[4] Plaintiffs note that nothing in the DPPA suggests that a vehicle's co-ownership affects its owners' interest in safeguarding

---

4. The DPPA defines "personal information" as:

> information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

18 U.S.C. § 2725(3).

the confidentiality of their personal information. In fact, the DPPA makes violators liable "to the *individual* to whom the information pertains." 18 U.S.C. § 2724(a) (emphasis added).

UNITE argues that Congress intended for co-owners of a vehicle to share one statutory damages award. In other words, UNITE contends that it should not have to pay multiple statutory damages awards for a single "transaction." Regardless of whether we agree with this position, UNITE asserts that we should exercise our discretion to decline to give multiple awards for a transaction involving only one vehicle.

UNITE also contends that certain co-owners do not have standing to sue under the DPPA. The DPPA authorizes civil actions by an "individual" and, with respect to Thomas Riley and Amy Riley, UNITE contends that because the information in their motor vehicle title pertains to an "entity," *i.e.* their tenancy by the entireties, they are not "individuals" within the meaning of the DPPA and therefore lack standing to sue. For Seth Nye and Holly Marston, UNITE states the record is unclear as to whether they are joint tenants or tenants in common. UNITE contends that this lack of evidence as to whether they own the car as an "entity" or an "individual" means that they cannot recover under the DPPA.

We have already explained what is necessary for standing to sue under the DPPA:

> The DPPA provides a private cause of action to "the individual to whom [unlawfully

> obtained, disclosed, or used] information pertains." *See* 18 U.S.C. § 2724(a) (2005). If the information does not "pertain" to an individual, then that individual may not sue under the DPPA. In other words, the only "interest" that the DPPA protects is an individual's interest in the privacy of motor vehicle records that include information about her. If a motor vehicle record does not include information about a person, then that person has no "legally protected interest" in the confidentiality of that motor vehicle record.

Pichler v. UNITE, 228 F.R.D. 230, 241 (E.D.Pa.2005). When UNITE searched the license plates of the vehicle owned by Thomas Riley and Ann Riley, and the vehicle owned by Holly Marston and Seth Rye, it obtained information about *each* of these four people. Each of them has an "interest" in the privacy of the motor vehicle record that included information about him or her, so each one has standing to sue.

As to UNITE's argument that each transaction only merits a single damages award, nothing in the DPPA supports that reading.[5] Congress intended to protect the confidentiality of people's identities and other personal information, and it undoubtedly knew when

---

5. UNITE compares how courts have treated damages issues under the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.* *See* UNITE's Mem. 3-5. However, the analogy is not helpful because of material differences between the language and purpose of the DPPA and those of TILA.

drafting the DPPA that some vehicles are co-owned. Nevertheless, it gave each "individual to whom the information pertains" the right to sue. Thus, an individual's DPPA-protected interest in shielding her privacy is not diluted because she co-owns a vehicle, and neither should her damages award be.

In sum, each person whose DPPA-protected interest UNITE violated is entitled to sue individually for each of the remedies set forth in Section 2724(b). We shall therefore amend the Judgment to grant separate damages awards to Thomas Riley and Amy Riley.

2. *Calculation of statutory damages*

Plaintiffs do not seek actual damages, but they do ask us to recalculate each award of liquidated damages. They contend that UNITE should pay $2,500 for each time it "obtain[ed]" or "use[d]" the personal information in violation of the DPPA. They deem each home visit and each mailing—except for mailings done in connection with the *Veliz v. Cintas* litigation, *see Pichler v. UNITE*, at 368—a separate "use[ ]." Thus, if UNITE searched one's license plate number to get one's name and address, then visited one at home, and also mailed one a union newsletter, plaintiffs contend that such a victim is entitled to $7,500. Of the nine named plaintiffs, three claim they suffered two violations each and seek $5,000 per person, and six claim they suffered three violations each and seek $7,500 per person.

UNITE contends that plaintiffs' calculation of statutory damages is contrary to the DPPA's language and Congressional intent, as well as the theory behind statutory damages. According to UNITE, the statutory damages are offered in lieu of *all* the actual damages that a plaintiff might prove from violations of Section 2724(a). In other words, if a plaintiff cannot prove any damages—even if UNITE visited her and mailed her a letter after obtaining her name and address—she is entitled to $2,500, but not a multiple of that sum.

UNITE also notes that in almost every DPPA case where a court finds liability, there will be an "obtain[ing]" violation and at least one "use [ ]" violation. Therefore, applying plaintiffs' reasoning would effectively raise the statutory damages minimum to $5,000 in almost every case.

Finally, UNITE argues that if Congress had intended to provide a plaintiff with multiple awards of statutory damages where she suffered multiple violations, it would have expressly stated that, as it has done in other statutes. *See* UNITE's Mem. 11 (citing seven statutory examples, including 26 U.S.C. § 7431(c)(1)(A), which specifies "$1,000 for each act of unauthorized inspection or disclosure of a [tax] return").

Plaintiffs are correct that under the DPPA each instance of "obtain[ing]" or "use[ ]" constitutes a violation of the DPPA. Section 2724(a) states that one who "obtains, discloses *or* uses personal information" for an impermissible purpose violates the DPPA. The

disjunctive "or" makes clear that each action stands alone as a violation. *See Parus v. Cator*, No. 05-0063, 2005 WL 2240955, at *4 (W.D.Wis. Sept.14, 2005) ("[Section 2724(a)] uses the disjunctive 'or' to connect the terms 'obtains,' 'discloses' and 'uses.' Therefore, each term must be given a separate meaning.").

However, multiple violations with respect to a single plaintiff do not automatically entitle that plaintiff to a separate statutory damages award for each violation. The DPPA does not specify *how* statutory damages should be calculated with respect to each plaintiff. We may have the discretion to stack the statutory damages awards as plaintiffs request, but whether we should do so is quite another matter.

The record shows that UNITE's violations, with respect to the named plaintiffs, consist of the union's obtaining each plaintiff's name and address, visiting most of them, and then sending some of them mail. *See Pichler v. UNITE*, 2006 WL 2529688, at 362 & n. 26, 368. There is no evidence that UNITE ever shared the named plaintiffs' personal information with anyone outside of the union, nor is there evidence that it contacted these plaintiffs for any purpose other than its Cintas organizing campaign.

Thus, UNITE is the typical defendant in a DPPA civil action: it obtained people's names and addresses so that it could use that information to contact them. Indeed, it would make little sense to merely collect names and addresses with no intention of using them in

some way. Congress surely understood that the usual case would involve at least one instance of "obtain[ing]" and one "use[ ]," and it decided that a plaintiff who did not or could not show actual damages could nevertheless receive $2,500. Therefore, we do not think it would be appropriate here to effectively double the statutory minimum by adding $2,500 for each violation as to a single plaintiff.[6]

On this record, we think a proper exercise of our Congressionally-authorized discretion is to award $2,500 in statutory damages to each named plaintiff.[7]

B. *Punitive Damages*

Plaintiffs contend that a jury trial on punitive damages is required. The DPPA does not provide for a

---

6. To be sure, some cases may merit multiple statutory awards per plaintiff. For instance, multiple awards might be proper if a DPPA violator had bombarded a person with weekly visits and mailings for months on end, despite that person's expressed desire that the contacts cease. However, the record here simply does not suggest that UNITE descended to such a gross disregard for the named plaintiffs' privacy.

7. It is undisputed that UNITE retrieved each named plaintiff's information from a license plate search, so each plaintiff suffered at least one DPPA violation. Because we choose not to award plaintiffs $2,500 for each subsequent violation, we need not address UNITE's quibbles about factual disputes, such as whether the named plaintiffs were all visited by UNITE, as opposed to representatives of the International Brotherhood of Teamsters, a former defendant here.

jury trial on this (or, for that matter, any) issue. In fact, it expressly sets forth that " *[t]he court* may award . . . punitive damages." 18 U.S.C. § 2724(b)(2) (emphasis added).

Plaintiffs cite our Order of August 1, 2005, wherein we explained that a plaintiff seeking punitive damages must prove that "(1) a defendant willfully or recklessly obtained, disclosed, or used personal information from her motor vehicle records; and (2) the purpose of such obtaining, disclosure, or use was not permissible under the DPPA." Order of Aug. 1, 2005 ¶ k. We found that both legal and equitable relief depended on resolving whether UNITE's purpose in obtaining, disclosure, or use was not permissible under the DPPA—the second element of the punitive damages claim—and therefore held that the Seventh Amendment required a jury to determine that "common issue." *Id.* at ¶ m. We did *not* hold that a jury had to resolve the first element of the punitive damages claim. We also noted we could enter summary judgment if uncontroverted evidence established that, as a matter of law, defendants acted for a permissible or impermissible purpose. *Id.* at 4 n. 4. On summary judgment, we indeed found that such evidence in fact established that UNITE violated the DPPA. Having resolved the "common issue" as a matter of law, we must now decide, pursuant to 18 U.S.C. § 2724(b)(2), whether punitive damages are warranted.

The DPPA plainly gives us the discretion to award *or* to deny punitive damages, even if UNITE violated the DPPA and did so willfully and recklessly. *See Pichler*

v. UNITE, 228 F.R.D. at 259. We must craft an appropriate award bearing in mind the purposes of the statute and the relevant jurisprudence on punitive damages. In particular, we are mindful of the Supreme Court's admonition that "[i]t should be presumed that a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve *punishment* or *deterrence*." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (emphasis added).

Plaintiffs contend that UNITE's willful and reckless behavior warrants punitive damages, particularly because it had notice that its license plate retrieval activities possibly violated federal law, but it continued to use that tactic. Indeed, in 2000 UNITE was sued under the DPPA in *Tarkington v. Hanson*, Docket No. 4-00-CV-00525 JMM (E.D.Ark. Aug. 25, 2000), and it settled that case. *See Pichler v. Unite*, 2006 WL 2529688, at *6-7 (describing the *Tarkington* litigation). Yet even after *Tarkington*, and after plaintiffs filed this lawsuit, UNITE continued using license plate searches in some campaigns, *see id.* at *4, though there is no evidence that it did so for the Cintas campaign after June of 2004.

UNITE has argued throughout this litigation that its decades-old practice of license plate retrieval is permissible and that its activities fall within the DPPA's exceptions. UNITE also points out that after many months of discovery and thousands of documents, there

is no evidence that it used people's personal information for anything other than matters directly connected to its union organizing campaign.

Notably, on April 26, 2006, *before* we held that UNITE's activities violated the DPPA, the UNITE Legal Department distributed a memorandum to its officers, staff, and affiliates that instructed campaigners as to what they may and may not do to obtain information for organizing and other campaigns. *See* UNITE's Supp. Mem. of Law ("UNITE's Supp."), Garren Decl. Oct. 3, 2006,[8] Ex. A. The first directive in that memorandum states: "Do not use license plate numbers to obtain any information from Department of Motor Vehicles records, including names and addresses. This policy applies in all states and provinces in the United States and Canada." *Id.*

We find that this clear instruction, plus the certainty that further license plate retrievals will result in costly damages awards, will effectively deter UNITE from further violations of the DPPA.[9] Thus, we achieve deterrence without imposing punitive damages.

As to punishment, while we now decide punitive damages only with respect to the named plaintiffs, we

---

8. Brent Garren is UNITE's Senior Associate General Counsel. UNITE's Supp., Garren Decl. ¶ 1.

9. Of course, if UNITE reverted to using this impermissible tactic, that would justify revisiting our punitive damages calculus.

cannot ignore the consequences of the class issues. Assuming for the moment that plaintiffs prevail on appeal, UNITE will surely have to pay a very large class award. With a class estimated (by plaintiffs) to include between 1,758 and 2,005 people, assuming $2,500 in statutory damages per person, UNITE will have to pay between $4,395,000 and $5,012,500 in statutory damages alone. Moreover, plaintiffs will be entitled to "reasonable attorneys' fees and other litigation costs reasonably incurred." 18 U.S.C. § 2724(b)(3). After more than two years of intensive litigation in a case involving many issues of first impression, plus extensive class discovery, we confidently predict that the attorneys' fees and costs will be considerable. Thus, UNITE will be amply punished by the multi-million-dollar award it will owe plaintiffs and the class if they prevail on appeal.

In sum, Congress's goal of protecting individuals' privacy is readily accomplished here by the imposition of statutory damages, the injunctive relief described below, and the reasonable attorneys' fees and costs that will be awarded to plaintiffs if they ultimately prevail. Punitive damages would not further advance the DPPA's purposes and are unnecessary to deter or punish UNITE. We shall therefore deny plaintiffs' request for punitive damages.

C. *Injunctive Relief*

Plaintiffs seek an injunction that would: (1) prevent UNITE from "obtaining, disclosing, or using personal information obtained from motor vehicle records for

purposes of union organizing or for any other purpose not permitted by 18 U.S.C. § 2721(b)," and (2) "order [ ] UNITE to permanently expunge from its records all information with respect to these named Plaintiffs, and to certify under oath that it has done so." Pls.' Supp. Mem. of Law 17. UNITE contends that the Norris LaGuardia Act, 29 U.S.C. § 104,[10] bars an injunction that

---

10. The Norris LaGuardia Act provides that:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(Cont'd)

would prevent the union from contacting Cintas employees who are members of the class in connection with UNITE's organizing campaign at Cintas. Nevertheless, UNITE seems to concede that the Norris LaGuardia Act would not bar *all* types of injunctive relief: "UNITE . . . submits that any injunction entered must be carefully tailored to avoid interference with a union's right to organize the employees of Cintas." UNITE's Mem. 24. In any event, UNITE contends that an injunction would be inequitable here because of the DPPA's harsh statutory liquidated damages.

As we have already found, this case is not about unfair labor practices, *see Pichler v. UNITE*, 339

(Cont'd)

> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 104.

F.Supp.2d 665, 668-69 (E.D.Pa.2004), nor is it a "labor dispute" within the meaning of the Norris LaGuardia Act.[11] This is a case about a union violating individuals' federally-protected interest in the confidentially of personal information. To be sure, UNITE enjoys the protections of the Norris LaGuardia Act, but those rights are not endangered here. We shall craft an injunction that is faithful to the DPPA's purposes, protects the named plaintiffs from further violations, and safeguards UNITE's right to continue prosecuting its Cintas organizing campaign.

To that end, we shall enjoin UNITE from using the named plaintiffs' personal information that was obtained in violation of the DPPA.[12] If UNITE can establish that

---

11. The Norris LaGuardia Act defines "labor dispute" to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c).

12. Our decision today does not resolve any potential class-wide relief issues. However, we note that UNITE argues that destruction of all class members' information would interfere with organizing efforts and be based on the false assumption that UNITE had obtained all class members' names and addresses through tagging. Indeed, we know such an assumption would be wrong because the parties have already

(Cont'd)

it obtained those plaintiffs' names and addresses through other legitimate means, this injunction will not bar the union from using that information in its organizing campaign. We stress that UNITE has the burden of proving that it lawfully obtained the named plaintiffs' personal information.

III. *Conclusion*

For the reasons we discuss above, we shall grant in part plaintiffs' motion to amend the Judgment. We shall grant Thomas Riley and Amy Riley each a separate statutory damages award of $2,500, and we shall impose an injunction that prohibits UNITE from using any personal information of the named plaintiffs that it obtained in violation of the DPPA. We shall also specify that plaintiffs shall file attorneys' fees and costs, if they prevail, after exhaustion of appeals.

An appropriate Order and amended Judgment follow.

(Cont'd)

stipulated that UNITE developed contact lists of presumed Cintas workers using many sources. *See* Jt. Stip. ¶ 29. These are matters we will revisit in the future.

Until then, we caution UNITE to think carefully about using any names and addresses obtained solely through activities that we have held violate the DPPA. Should it decide to do so, evidence of such use would be highly relevant in determining appropriate class-wide relief, including damages calculations and injunctions.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 04-2841

ELIZABETH PICHLER, et al.

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES AFL-CIO), et al.

ORDER

AND NOW, this 17th day of October, 2006, in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. Plaintiffs' motion is GRANTED IN PART and DENIED IN PART as described in the accompanying Memorandum and as set forth in the Amended Judgment entered this day;[1] and

2. The Clerk shall ENTER judgment in accordance with the accompanying amended Judgment.

BY THE COURT:

/s/ Stewart Dalzell, J.

---

1. Neither this Order nor the amended Judgment affect our express determination, pursuant to Fed.R.Civ.P. 54(b), "that there is no just reason for delay of the entry of judgment as to the named plaintiffs." Order of Aug. 30, 2006 ¶ 6.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AUGUST 30, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 04-2841

ELIZABETH PICHLER, et al.

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES AFL-CIO), et al.

MEMORANDUM

Dalzell, J. August 30, 2006

In 2003 and 2004, two labor unions obtained many license plate numbers from cars in the parking lots of a firm whose employees they were attempting to organize. The unions used those license plate numbers to get employees' names and addresses. Claiming that the unions' actions violated the Driver's Privacy Protection Act of 1994 ("DPPA" or the "Act"),[1] the named plaintiffs brought this class action. Before us now are the parties'

1. 18 U.S.C. §§ 2721-2725 (2006).

cross-motions for summary judgment[2] and their stipulations of fact.[3]

---

2. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n. 10, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.' " *Id.* at 587, 106 S.Ct. 1348 (quoting Fed.R.Civ.P. 56(e)). The task for the Court is to inquire "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-52, 106 S.Ct. 2505; *Tabas v. Tabas*, 47 F.3d 1280, 1287 (3d Cir.1995) (en banc).

3. The parties have stipulated to certain facts, *see* Jt. Stipulation of Facts for Parties' Cross-Motions for Summ. J. ("Stip.") ¶¶ 1-61; Supplement to Jt. Stipulation ("Stip.Supp.") ¶¶ 65-67, as well as to the authenticity of some documents, *see* Stip. ¶ 62(a)-(bb); Stip. Supp. ¶ 68, and the filing of other documents, *see* Stip. ¶ 63(cc)-(dd), ¶ 64(ee).

We note that plaintiffs object to the introduction of several of UNITE's exhibits, *see* Letter to the Court, June 14, 2006, but, as evidenced below, plaintiffs are not materially prejudiced by these exhibits, so we shall allow them.

Appendix C

I. *Factual Background*

Cintas Corporation ("Cintas") is the largest employer in the industrial laundry industry in the United States. Jt. Stipulation of Facts for Parties' Cross-Motions for Summ. J. ("Stip.") ¶ 13. It employs about 28,000 people at 350 locations in the United States and Canada, and many employees working in Cintas facilities are either female, black, or Hispanic. *Id.* ¶¶ 13, 15. Cintas is philosophically opposed to unions and union organizing. *Id.* ¶ 16.[4]

In the fall of 2002, the Union of Needletrades, Industrial & Textile Employees AFL-CIO ("UNITE")[5] "decided to launch a campaign concerning Cintas." *Id.* ¶ 14. Bruce Raynor, who has been the President of

4. According to the Cintas employee handbook, "Cintas partners work best without outside interferences that disrupt our spirit of teamwork. Labor unions usually approach relationships with employers with antagonism which often results in a 'we-they' attitude in the work place." Stip. ¶ 16. In "The Spirit Is the Difference"-a Cintas publication explaining its corporate philosophy-Cintas states that "[w]e simply don't think we can properly manage our business with unions standing between the company and employees." *Id.* ¶ 17.

5. UNITE is a labor union that was formed in 1995 by the merger of two predecessor unions, the International Ladies Garment Workers Union ("ILGWU") and the Amalgamated Clothing & Textile Workers Union ("ACTWU"). Stip. ¶ 9. In the summer of 2004, UNITE merged with the Hotel Employees & Restaurant Employees Union ("HERE"), to form UNITE HERE. *Id.* For the sake of simplicity, we shall refer to the entity that is a defendant in this case as "UNITE."

UNITE since July of 2001,[6] *id.* ¶ 10, described the Cintas campaign in a November 30, 2001 letter to John Sweeney, the President of the AFL-CIO:

> Our biggest challenge will be launching our organizing drive against several laundries owned by Cintas, the nation's largest, and very anti-union, uniform services company. Cintas will prove to be the toughest adversary for UNITE for several years, but this is a campaign that we must wage due to Cintas' 23% market share in the uniform services sector.

Id. Ex. A.

The record, which we now canvass, confirms what these Cintas and UNITE policy statements suggest. Each party sees its opponent as the white whale.

A. *Preparing for the Cintas Campaign*

The Cintas campaign consisted of a preparation, or planning, phase and a public phase. Stip. ¶ 25. UNITE's preparation phase took place in the fall and early winter of 2002 through 2003. *Id.* It involved finding out as much as possible about Cintas and any issues its workers might have, preparing written materials and organizing

---

6. From 1999 until he became President in 2001, Raynor was Secretary-Treasurer of UNITE. Stip. ¶ 10. Raynor has been employed by UNITE or its predecessor unions in various capacities since 1973. *Id.*

strategy, and compiling lists of names and addresses of workers to contact during the public phase. *Id.* From the beginning, "a component of the campaign to organize and unionize Cintas workers" was "finding potential legal claims against Cintas, in part through home visits." *Id.* ¶ 21; *see also id.* Ex. DD Garren Decl. ¶ 2, Dec. 2, 2005.[7]

During the course of its research, UNITE learned that Cintas had paid a ten million dollar settlement in *Vaca v. Cintas*, BC 250459 (Sup.Ct.Cal. Sept. 4, 2002), an action alleging that UNITE had violated California overtime laws. Stip. ¶ 18. UNITE also learned that Cintas had been a defendant in actions alleging unlawful employment discrimination, and was a respondent in OSHA and NLRB proceedings. *Id.* ¶ 19. Moreover, UNITE's research uncovered alleged unfair labor practice charges that unions had filed against Cintas and its subsidiaries from 1998 through 2001. *Id.* ¶ 20.

UNITE prepared documents concerning strategy and training for the campaign.[8] By the fall of 2002,

---

7. Brent Garren is Senior Associate General Counsel for UNITE. Stip. Ex. DD Garren Decl. ¶ 1.

8. Even before the preparation phase, Jennifer Roitman, UNITE's national lead organizer, summarized her understanding of the Cintas campaign in the summer of 2001 in a document entitled "Set-up-August-October." *See* UNITE's Mem. of Law in Support of Mot. for Summ. J. ("UNITE's Mem.") 5; *see also* Stip. Ex. B "Set-up-August-October". For instance,

(Cont'd)

UNITE had prepared a "Campaign Plan" that described its "Goal" as a "National Contract covering workers in 6-7 key cities covering 3000 workers." *Id.* Ex. I; *see also* Pls.' Mem. of Law in Supp. of Mot. for Summ. J. ("Pls.' Mem.") Ex. 11 Qadeer Dep. 146:8-149:23.[9] The Plan's "Campaign Strategy" included a "Legal" component: "Identify any areas where the company is violating the rights of the workers (FLSA, OSHA, NLRB, EEOC et.) file lawsuits to ensure that the company follows the law." Stip. Ex. I. In each of the seven metropolitan areas that UNITE targeted, it hired a law firm to assist legal coordinators and provide representation to Cintas employees identified as potential plaintiffs. UNITE's Mem. Qadeer Decl. ¶ 8.

(Cont'd)

under the heading "Membership," the "GOAL" in each city was to "ID ex CINTAS workers-possible plaintiffs, develop contacts with current [C]intas workers, build membership activity and participation to make campaign successful." Stip. Ex. B at Bates No. 013926. Under the "Legal" heading, the "GOAL" was "1 legal case (ideally W & H or discrimination) in each city" for which they would "Investigate-and if we find violations, prepare lawsuits with ex-Cintas workers as plaintiffs-ready to file on launch day." *Id.* at Bates No. 013927.

9. Ahmer Qadeer is UNITE's Deputy Director of the Strategic Affairs Department, and he has held that position or similar ones with the organization since February of 2000. UNITE's Mem. Qadeer Decl. ¶ 1. His responsibilities included coordinating aspects of the Cintas campaign, including overseeing all research and campaign activities concerning the company. *Id.*

Appendix C

UNITE also prepared a 132-page "Legal Training Laundry Campaign" document which UNITE attorneys, along with outside counsel, used on September 11 and 12, 2002 to train twelve UNITE members who were the lead organizers and legal coordinators for the regions where UNITE would kick off its campaign. *Id.* Ex. L; *see also id.* Ex. DD Garren Decl. ¶ 4; UNITE's Mem. Qadeer Decl. ¶ 6, Chambers Decl. ¶ 14, May 11, 2006.[10] According to the "Agenda for Legal Training," the two-day training covered such topics as the Fair Labor Standards Act ("FLSA"), the Family Medical Leave Act ("FMLA"), various types of discrimination, unfair labor practices, and workers' compensation. Stip. Ex. L at Bates No. 055580.[11] In

---

10. Megan Chambers was the Cintas campaign director for the New York metropolitan area. UNITE's Mem. Chambers Decl. ¶ 1.

11. The training materials included sample survey questions regarding discrimination, sexual harassment, and the FLSA, *see* Stip. Ex. L at Bates Nos. 055582-055587; discrimination hypotheticals, *id.* at Bates Nos. 055588-055591; state discrimination law summaries, *id.* at Bates Nos. 055592-055594; EEOC materials on job discrimination, *id.* at Bates Nos. 055595-055605, 055607-055608; a Charge of Discrimination form, *id.* at Bates No. 055609; outlines for EEOC, FLSA, and ADA claims, *id.* at Bates Nos. 055610-055619; summaries of state wage and hour laws, *id.* at Bates Nos. 055621-055622; a comparative chart of federal discrimination law, *id.* at Bates No. 055623; FLSA problems to analyze, *id.* at Bates Nos. 055624-055625; U.S. Department of Labor materials on the FLSA, *id.* at Bates Nos. 055629-055654; workers' compensation materials, *id.* at Bates Nos. 055656-055667, 055684-055699; and OSHA regulations and forms, *id.* at Bates Nos. 055675-055677, 055709-055711.

November of 2002, UNITE conducted another training session that about sixty field staff attended. Chambers Decl. ¶ 15. This included a half-day training session on identifying employee legal violations and the role of legal coordinators. *Id.* A month later, at its Organizing Summit on December 6 and 7, 2002, UNITE used a Power Point presentation that included a slide stating, "What it will take to beat CINTAS . . . Sustained ground campaign to win support of workers and develop legal and moral attack on company." Stip. Ex. D at Bates No. 026753.[12]

B. *Obtaining Cintas Workers' Contact Information*

"In order to contact workers as part of UNITE's organizing campaign," UNITE compiled lists of names and addresses of presumed Cintas workers using a variety of sources, including other workers, telephone and city directories, cross-directories, other public records, Internet databases, raffles, and discarded company lists. Stip. ¶ 29. Some organizers also followed workers home to get addresses. Pls.' Mem. Ex. 16 Scimone Dep. 108:19-109:21, Aug. 23, 2005.[13] UNITE planned to visit thousands of Cintas employees in their homes. Stip. ¶ 22. It deemed such house calls essential because it believed that workers would be reluctant to

---

12. At an unspecified time, UNITE also developed a Cintas Shop Towel Survey form and surveys concerning Cintas's alleged wage and hour violations. *Id.* ¶¶ 45-46.

13. Michael Scimone was UNITE's lead organizer in Southeast Pennsylvania, which includes Emmaus. Pl.'s Mem. 9 n. 12.

talk to UNITE representatives at work for fear that Cintas management would retaliate. *Id.* ¶ 41.

Most significantly for purposes of this case, UNITE accessed motor vehicle records "to help create lists of names of presumed Cintas workers to contact at home as part of UNITE's Cintas campaign." *Id.* UNITE has used this method—sometimes referred to as "tagging"—in organizing campaigns since at least the 1970s. *Id.* ¶ 31. The site coordinators at the various facilities that UNITE was seeking to organize had discretion to use motor vehicle information to build their lists. *Id.* ¶ 38. UNITE representatives testified that they were unaware of the union issuing any guidelines, directives, or restrictions regarding when and how organizers could access motor vehicle records. *See* Pls.' Mem. Ex. 7 Raynor Dep. 53:9-21, Feb. 16, 2005; Ex. 1 Bennett Dep. 140:19-141:5, Jan. 12, 2006; Ex. 12 Chambers Dep. 53:9-21, Sep. 28, 2005; Ex. 14 Gres Dep. 59:21-60:8, July 29, 2005; Ex. 9 Mestrich Dep. 46:6-47:17, Feb. 3, 2005; Ex. 8 DeMay Dep. 55:21-24, 64:10-15, Feb. 8, 2005; Ex. 16 Scimone Dep. 136:10-15.[14]

---

14. Ernest Bennett is UNITE's International Vice-President and Director of Organizing. *See* Pls.' Mem. 8 n. 8. Elizabeth Gres was a UNITE Organizing Director in Michigan and became the Director of the Cintas campaign in the fall of 2003. *See id.* at 8-9 n. 9. Keith Mestrich was UNITE's Rule 30(b)(6) witness and, at all relevant times, Director of UNITE's Strategic Affairs Department. *See id.* at 6 n. 5. Peter DeMay is UNITE's Organizing Director for the Chicago and mid-states region. *See id.*

Appendix C

UNITE used license plate numbers on cars found in Cintas parking lots to access information relating to those license plate numbers contained in state motor vehicle records. Stip. ¶ 30. UNITE organizers would typically watch, or walk or drive through, a Cintas parking lot and either write down or dictate into a tape recorder (to be transcribed later) the license plate numbers, and sometimes the makes and models, of cars parked in the lot, or entering or leaving it. *Id.* ¶ 33. Ideally, the organizers looked to see if the same license plate showed up at least twice to minimize the risk that the car belonged to a random visitor rather than a Cintas employee. *Id.* UNITE organizers would use their lists of license plate numbers to access motor vehicle records in one of two ways: through Westlaw—a computer-assisted research database that has motor vehicle record databases for about thirty states—or through private investigators or "information brokers." *Id.* ¶ 34.

UNITE maintained two Westlaw accounts that allowed access to databases called WestLaw Public Records Pro. *Id.* ¶ 35. Jason Coulter, UNITE's Assistant National Organizing Director as of September 1, 2001, *see* Supp. Stip. Ex. GG, maintained one account, and Peter DeMay, UNITE's Organizing Director for the Chicago and mid-states region, maintained the other. Stip. ¶ 35. Westlaw account 1003099727, started on September 10, 2002, was originally in the name of Daniel Kotzin, who was a friend of Coulter and not an employee of UNITE. *Id.* Beginning in December of 2002, that account was in the name of "Jason Coulter Consulting—UNITE." *Id.* The other Westlaw account, 1003853823,

was in the name of UNITE since its inception on March 27, 2002 and throughout its existence. *Id.*

Before an organizer could access the information on Westlaw, a screen would appear that asked the inquiring party to check a box designating which of certain specified "permitted uses" applied that entitled the user to access pursuant to the Drivers' Privacy Protection Act and applicable state laws. *Id.* ¶ 36.[15] Coulter, who gave his password to others and instructed them on how to retrieve information using license plates, does not recall telling them which permitted use to select, nor does he recall which he selected. *See* Pls.' Mem. Ex. 13 Coulter Dep. 208:5-210:18, Oct. 27, 2005. Megan Chambers recalls Coulter telling her to select a "legal investigation" option. *See* UNITE's Mem. Chambers Decl. ¶ 8. Peter DeMay randomly selected either "skip tracing" or "litigation or legal research." *See* Pls.' Mem. Ex. 8 DeMay Dep. 102:19-104:9. Elizabeth Gres generally selected "skip tracing." *See id.* Ex. 14 Gres Dep. 78:4-10. Michael Scimone did not remember which use he selected. *See id.* Scimone Dep. 57:6-24.

---

15. In the databases of UNITE searches that Westlaw produced in response to a subpoena, the permitted use the inquiring party designated is set forth as a number code. Stip. ¶ 36. Not all permitted uses were available in all states, but the same number always referred to the same permitted use, regardless of the state: 1-Use by Gov't Agency; 3-Skip Tracing/ Info Verification; 4-Court Proceedings; 6-Insurance Claims Investigation; and 8-private investigator for DPPA purpose. *Id.*

Appendix C

In Pennsylvania, New York, Michigan and Illinois, UNITE obtained names and addresses through a private investigator named John Rea. Stip. ¶ 37. Rea gave license plate numbers to another investigator or "information broker" in the state in question. *Id.* They, in turn, either themselves or through yet other intermediaries obtained the information by directly applying to the states' motor vehicle bureaus. *Id.*[16] According to Rea, no one from UNITE ever told him that UNITE needed the license plate information for any particular reason, including in connection with any lawsuit. Pls.' Mem. Ex. 20 Rea Dep. 20:7-24:6, 35:18-36:14, Feb. 7, 2005. Two of Rea's UNITE contacts confirm that they did not tell him why they needed the information. *See id.* Ex. 8 DeMay Dep. 64:16-65:5; Ex. 12 Chambers Dep. 56:5-25.

UNITE accessed motor vehicle records in connection with its Cintas campaign in Connecticut, New York, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Wisconsin, Nevada, and California (Sacramento). Stip. ¶ 40. UNITE did most of the motor vehicle searches during the fall and early winter of 2002 through 2003,

---

16. For example, in Pennsylvania, Rea gave the license plate numbers to Infotrack, who forwarded them in turn to American Investigation Resource, who submitted separate "service requests" to Pennsylvania Auto License Brokers, who ultimately got the information from the Pennsylvania Department of Transportation. Stip. ¶ 37. In New York, Rea dealt with a private investigator named Robert Carroll. In Michigan, Rea dealt with an investigator named Harold Sneath. *Id.*

and during the preparation period for the public kick-off of UNITE's Cintas campaign, but it also conducted some Cintas-connected motor vehicle searches until the filing of this lawsuit in mid-2004. *Id.* ¶ 39. UNITE representatives "did not maintain any records identifying which employee names and addresses they obtained through motor vehicle searches as opposed to other means." Pls.' Mem. Ex. 24 Defs.' Supp. Objs. & Resps. to Pls.' First & Second Set of Interr. & Req. for Docs. at 7.

While preparing to conduct home visits of workers at Cintas's Emmaus, Pennsylvania facility, UNITE accessed all of the named plaintiffs' motor vehicle records in late 2003 and early 2004. Stip. ¶ 8. Vehicle record abstracts from the Pennsylvania Department of Transportation show that on December 9, 2003 UNITE accessed Russell Christian's records, and on January 23, 2004 it accessed the records of Elizabeth Pichler, Seth Nye, Holly Marston, Kevin Quinn, Jose Sabastro, Russell Daubert, Thomas Riley, and Amy Riley. *See* UNITE's Mem. of Law in Opp'n to Pls.' Mot. for Summ. J. ("UNITE's Opp'n"), Kennedy Decl., June 19, 2006, Ex. B; Pls.' Sur-Reply Ex. 42.[17] Cintas employed named

---

17. Despite UNITE's stipulations that it accessed the named plaintiffs' motor vehicle records, *see* Stip. ¶¶ 8, 32, it now claims in a footnote that the records show it did not access Thomas Kiley's or Amy Riley's information and that their claims should therefore be dismissed, *see* UNITE's Opp'n 3 n. 1. At this very late date, we are not inclined to allow the parties to renege on their stipulated facts. Moreover, the record shows

(Cont'd)

plaintiffs Elizabeth Pichler,[18] Seth Nye,[19] Kevin Quinn,[20] Jose L. Sabastro, Thomas Riley, and Russell Daubert[21] at its Emmaus facility at times relevant to this case. Stip.

(Cont'd)
that the Pennsylvania Auto License Brokers, who worked indirectly on behalf of UNITE, *see supra* n. 16, did in fact access the Rileys' motor vehicle record on January 23, 2004. *See* Pl.'s Sur-Reply Ex. 42, Pa. Dept. of Transportation Vehicle Record Abstract for Thomas & Amy Riley. In light of defendants' stipulations and the record evidence, we shall not dismiss the claims of Thomas Riley and Amy Riley. It would appear that, for DPPA purposes, they as married owners of the car constitute a single victim.

18. Elizabeth Pichler is a non-supervisory Cintas employee. Stip. ¶ 6. Unaccountably, in every entry on the docket, Ms. Pichler's surname is misspelled. In the accompanying Order, we at last set the record straight.

19. In January of 2003, Seth Nye was a management trainee at Cintas who was promoted to the supervisory position of Service Manager at the Emmaus facility. Stip. ¶ 3. He has the authority to discipline the employees he supervises. *Id.*

20. Kevin Quinn is a Service Manager and a supervisor. Stip. ¶ 4.

21. Jose Sabastro, Thomas Riley, and Russell Daubert are Service Training coordinators ("STCs"). Stip. ¶ 5. STCs are assistants to the Service Managers responsible for training employees. *Id.* Thomas Riley testified in his deposition that he was in a supervisory position. Russell Daubert testified he was also an STC, like Riley. *Id.* Plaintiff Jose Sabastro is also a salaried STC who assists a Service Manager in the Emmaus facility in training Cintas drivers. *Id.*

Appendix C

¶ 1. Named plaintiffs Russell Christian,[22] Holly Marston,[23] and Amy Riley[24] are not Cintas employees and were not Cintas employees at times relevant to this case. *Id.* ¶ 2. Plaintiffs and Cintas estimate that UNITE accessed the motor vehicle records of the named plaintiffs and a plaintiff class consisting of between about 1,758 and 2,005 Cintas employees, or their relatives or friends. *Id.* ¶ 32.

According to Westlaw's records, UNITE conducted about 13,700 motor vehicle searches on Westlaw from August of 2002 to October 13, 2004. Stip. Supp. ¶ 65. Some of these were duplicate searches of the same license plate number, and some did not result in the retrieval of any information. *Id.* About 1,576 of UNITE's searches on Westlaw related to Cintas. *Id.* ¶ 66. For the Cintas-related searches, plaintiffs calculate that 223 had permitted use indications, and defendants calculate that 148 did. *Id.* ¶ 67.[25]

---

22. Russell Christian is the live-in boyfriend of a Cintas employee. Stip. ¶ 7.

23. Holly Marston is Seth Nye's mother. Stip. ¶¶ 3, 51. Her surname, too, has been misspelled, but no longer.

24. Amy Riley is Thomas Riley's wife. Stip. ¶ 5.

25. The parties agree that their varying numbers-arising from a dispute over which items should be excluded from the calculations and possible minor discrepancies in eliminating duplications-should not be material to their motions. Stip. ¶ 67 n. 1.

For searches done prior to around May of 2003, West's designated deposition witness testified that West is unable to retrieve the permissible use codes associated with those searches. *See* Pls.' Mem. Ex. 21 Appold Dep. 80:8-17, Nov. 3, 2005.

Appendix C

C. *Launching the Cintas Campaign*

The public phase started with a kick-off of intense activity on the weekend of January 11, 2003 "when UNITE publicly announced its organizing campaign and began actively organizing." Stip. ¶ 26. This "blitz" involved, among other things, "house calling," and, after the weekend, leafleting and talking to workers at Cintas facilities. *Id.* ¶ 26. On May 6, 2003, after the public phase was underway, UNITE and the International Brotherhood of Teamsters ("Teamsters") entered into what they called the Cintas Organizing Campaign Cooperation Agreement to "bring their combined resources to bear in a coordinated fashion to win union representation and good collective bargaining agreements for Cintas employees." *Id.* ¶ 61, Ex. E.

From January of 2003 through June of 2004, UNITE representatives conducted at least 3,000 home visits to Cintas employees. *Id.* ¶ 28. UNITE or the Teamsters visited the homes of all the named plaintiffs except Seth Nye. *Id.* ¶¶ 50-58.[26] The home visits allowed UNITE to

---

26. Tom Riley's wife, Amy Riley, answered the door to two men who said, "hello, how are you" and identified themselves as being from Cintas. Stip. ¶¶ 53, 54. She thought they were Tom's friends from work, so she went to get him down in the basement, where he was working, *id.* He went to the door, and she went to the kitchen where she was unable to hear the conversation. *Id.* ¶ 54. Tom Riley asked the two men dressed in black if he could help them, and they explained that they were from UNITE/Teamsters. *Id.* ¶ 53. He replied, "There is no need

(Cont'd)

Appendix C

(Cont'd)

for me to talk with you, there is nothing that you can say to me, and would you please leave." *Id.* They did so. *Id.* Tom Riley came back to his wife and told her never to answer the door to them again. *Id.* ¶ 54. She claims that the same two men returned "a week later on a weekday" when she was alone. *Id.*

On February 7, 2004 two women, one black and one white, rang Kevin Quinn's doorbell. *Id.* ¶ 56. When he opened the door they asked for him by name, and he said, "That's me." *Id.* The women told him that "they were organizing a union campaign against Cintas." *Id.* He told them he was not interested and shut the door. *Id.* The women got in their car and left. *Id.*

Jose L. Sabastro was on his porch when two men entered his yard. *Id.* ¶ 55. One man introduced himself and said he was from the Teamsters. *Id.* Sabastro said he was not interested and told them to get off his property, which the two men did. *Id.*

Russell Christian said that a man came to the door, identified himself as being from the union and asked if he was Russell Christian. *Id.* ¶ 57. He said, "Yes, I am." *Id.* Asked whether he worked at Cintas, he said, "No," and motioned to Kathleen Kelly saying, "She does." *Id.* Kelly told Christian, "No, I don't want to talk to him. Shut the door." *Id.* Christian did so, and the man left. *Id.*

Holly Marston, Seth Nye's mother, answered the door at 1660 Ross Lane on "a cold, cloudy day." *Id.* ¶ 51. A short Latino man in a UNITE hat told her that he was "canvassing the area to get support for the union." *Id.* She said, "My son is a management trainee," and the canvasser said, "Oh, he's one of those" and left. *Id.* Both Nye and Marston later received a leaflet from UNITE through the United States mail. *Id.* ¶ 52.

Upon answering her doorbell one day, Elizabeth Pichler saw someone from UNITE. *Id.* ¶ 58. She said that she was not interested and shut her door. *Id.*

talk to workers in a private setting, away from Cintas supervisors. *Id.* ¶ 28. According to Brent Garren, UNITE's Senior Associate General Counsel, UNITE staff members conducted these home visits "to discuss with [Cintas workers] their experiences working at Cintas and their desire for union representation." *Id.* Ex. DD Garren Decl. ¶ 5. UNITE representatives testified that before contacting someone they did not know whether that person was aware of any possible legal issues, *see* Pls.' Mem. Ex. 11 Qadeer Dep. 247:21-249:3; Ex. 12 Chambers Dep. 49:3-8; Ex. 16 Scimone Dep. 114:3-6; Ex. 10 Watson Dep. 32:8-22, nor were they sure that the person was a UNITE employee, *see id.* Ex. 9 Mestrich Dep. 141:2-12; Ex. 16 Scimone Dep. 113:8-22.

Field staff used "house call sheets" to record the results of home visits. Stip. ¶ 22. During or immediately after house calls, the organizers filled out house call sheets, which had boxes for recording information about (1) the workers' job, shift, ethnicity, and other status; (2) the workers' interest in the union on a numerical scale; and (3) and general comments. *Id.* Some of the house call sheets included a notation for "legal follow-up," and some did not. *Id.* The purpose of such sheets was not recording workers' complaints about discrimination, but rather their interest in unionization. *Id.* Ex. CC Hodek Second Decl. ¶ 7, Nov. 30, 2005.[27] UNITE field staff had also developed Law Violation Report Forms, which UNITE used in Michigan when

27. Julie Hodek has been a research analyst with UNITE since June of 2003. Stip. Ex. CC Hodek Second Decl. ¶ 1.

visiting employees in their homes. *Id.* ¶ 23. Moreover, in July of 2003 UNITE developed a form called "Discrimination Inventory: Information to be Gathered in Preparation for Litigation," which asked whether a complaint had been made, the status of the complaint, and whether there was "Potential". *Id.* ¶ 24; *see also id.* Ex. Y Discrimination Inventory form. UNITE representatives drafted this new form to prepare for and prosecute claims against Cintas. Stip. Ex. CC, Hodek Second Decl. ¶¶ 1, 5-6; *id.* Ex. DD Garren Decl. ¶¶ 8-9.

As a result of its home visits, UNITE prepared at least twenty-nine Legal Violations Reports. Stip. ¶ 27. Those reports include people whose names and addresses UNITE got from Westlaw or John Rea, based upon motor vehicle records. *Id.* ¶ 27. UNITE filled out Legal Violation Reports as a result of visiting seven putative class members: Betty Jean Higgs, Ida Mae Ray,[28] Marakisa Henderson, Maria L. Villalta, Maria M. Rubet,[29] Maria Monsod,[30] Mercedes Vega. *Id.* ¶ 27.

From 2002 through October 13, 2004, UNITE brought or assisted in bringing against Cintas six

---

28. Ida Mae Ray appears on both the Westlaw Exhibit 8 and Exhibit 9 lists. Stip. ¶ 27. Ms. Ray was searched under two separate Westlaw account numbers. *Id.*

29. Maria Rubet appears twice on the Westlaw Exhibit 8 list. Stip. ¶ 27.

30. Maria Monsod is associated with Edwin Monsod, who appears twice on the Westlaw Exhibit 8 list. Stip. ¶ 27.

federal cases,[31] three state court cases,[32] eighteen charges with the Equal Employment Opportunity Commission ("EEOC"),[33] and four charges with the Occupational Safety and Health Administration ("OSHA").[34] UNITE also filed unfair labor practice charges with various offices of the National Labor Relations Board ("NLRB"), some of which were settled

---

31. The six federal cases are: *Ramirez v. Cintas Corp.*, No. CV-04-281 (N.D.Cal.) (filed Jan. 20, 2004); *Veliz v. Cintas*, No. C 03-1180(SBA) (N.D.Cal.) (filed Mar. 19, 2003); *Grindle (Ohio) Plaintiffs; Harris, et al. v. Cintas Corp.*, No. 04 CV 6040 T(P) (N.D.N.Y.) (filed Jan. 29, 2004); *Houston and Cooper v. Cintas Corp.*, No. C 05-03145 (N.D.Cal.), 2005 WL 2614133 (filed Aug. 3, 2005); and *Holloman v. Cintas Corp.*, No. A-04-CA-1092 (W.D.Tx.) (filed Dec. 28, 2004). Stip. ¶ 49.A.1-6.

32. The three state court cases are: *Amaral and Hernandez, et al. v. Cintas Corp.* (Sup.Ct. Cal. Alameda Co.) (filed June 23, 2003); *Ayon v. Cintas*, No. BC310696 (Sup.Ct.Ca.L.A.Co.) (filed Feb. 17, 2004); and a lawsuit by the Connecticut Attorney General to enforce the Clean Water Act. Stip. ¶ 49.B.1-3.

33. UNITE assisted eighteen Cintas employees who filed EEOC charges against their employer from July 1, 2002 through October 13, 2004, as well as three employees who filed such charges from December 17, 2004 through July 10, 2005. Stip. ¶ 49.C.2.

34. The OSHA complaints against Cintas concerned its Rochester, New York facility (filed June 4, 2004); Central Islip, New York facility (filed May 6, 2004); Bedford Park, Illinois facility; and Schaumburg, Illinois facility. Stip. ¶ 49.E.1-4.

UNITE filed the Central Islip complaint on behalf of Cintas employee Sergio Mateo. *Id.* ¶ 49.E.2. It also filed a complaint on Mateo's behalf alleging that Cintas retaliated against him for requesting health and safety records of employees. *Id.* ¶ 44. The parties' stipulation does not make clear whether these were two distinct actions.

without any admission of liability. *Id.* ¶ 42; *see also id.* Ex. M UNITE-filed NLRB charges and case correspondence. It also assisted two putative *Pichler* class members in Marin County, California to file complaints concerning wages, and it wrote a letter to the County urging enforcement of the wage ordinance. *See* UNITE's Mem. Qadeer Decl. Exs. P, Q.

In addition to the UNITE-assisted EEOC charges that Cintas employees filed, on November 18, 2003 UNITE and the International Brotherhood of Teamsters filed a charge with the U.S. EEOC[35], the Ohio Civil Rights Commission, and the California Department of Fair Employment and Housing. The charges alleged that Cintas discriminated against employees on the basis of race, color, sex, and national origin, specifying discriminatory acts at nine Cintas facilities: Las Vegas, Nevada; San Diego, California; Central Islip, New York; Springfield, Missouri; Landover, Maryland; Rochester, New York; Irvington, New Jersey; Westlake, Michigan; San Leandro, California. *Id.* ¶ 43. The charges identified six Cintas employees who alleged that Cintas discriminated against them: Roberto Ramirez and Maria Ubia from Las Vegas, Nevada; Robert Harris from Rochester, New York; Stacey Stern from Chicago, Illinois; Amy Severson from Springfield, Missouri; and Luis Cardoza from San Leandro, California. *Id.* The

35. We note that in a different paragraph the Stipulation also refers to a November 17, 2003 joint EEOC charge. The parties confirmed to Chambers staff that this difference in date is immaterial because the paragraphs refer to the same joint charge.

EEOC charge was dismissed on March 8, 2005 because of *Ramirez v. Cintas Corp.*, No. CV-04-281 (N.D.Cal.), a lawsuit based on the same allegations and issues. Stip. Facts ¶ 49.C.1.

UNITE also sent letters to Cintas employees. On or about March 19, 2003, it sent a letter to about 1,000 of them. *Id.* ¶ 47, Ex. R. UNITE addressed the letter to Cintas drivers and informed them about a national class action lawsuit that it had helped Cintas drivers to file in order to collect unpaid overtime. *Id.* The letter concluded by stating, "For more information about the lawsuit or about how you can become involved in UNITE, contact us. . . ." *Id.* On September 23, 2004, it sent another letter to thousands of current and former Cintas employees. *Id.* ¶ 48, Ex. Q. UNITE and the Teamsters both signed this letter, addressed to "all Current and Former Cintas Drivers," which provided more information about the overtime payment lawsuit, stated there was limited time left to join the lawsuit, and directed those interested in claiming their unpaid overtime wages to fill out an enclosed Consent to Sue form. *Id.* Ex. Q.

D. *Earlier Litigation Concerning the Driver's Privacy Protection Act of 1994*

In 2000, plaintiffs in *Tarkington v. Hanson and UNITE*, Docket No. 4-00-CV-00525 JMM (E.D.Ark. Aug. 25, 2000), sued UNITE under the Driver's Privacy Protection Act of 1994 and Arkansas state law, and filed an amended complaint seeking class status. Stip. ¶ 59. Plaintiffs there alleged that UNITE obtained motor

vehicle license plate numbers from vehicles parked in the Dillard's Distribution Center in Mabelvale, Arkansas, and used those licenses plates to wrongfully get people's personal information—including names, addresses, and telephone numbers—from the state motor vehicle agency, and then solicit people at their homes. *Id.* Ex. AA *Tarkington v. UNITE*, Am. Class Action Compl. ¶ 8.

Brent Garren, UNITE's Senior Associate General Counsel, in consultation with Dave Prouty, counsel to UNITE's organizing department, was responsible for directing the course of the *Tarkington* litigation. *See* Pls.' Mem. Ex. 23 Garren Dep. 42:21-25, 50:25-51:16, July 28, 2005. Garren testified in his deposition that he discussed with Raynor the terms of the settlement as it was being negotiated. *Id.* at 63:24-64:2, 71:6-13, 84:5-9.[36]

Bruce Raynor executed the two Release and Settlement Agreements concerning *Tarkington*, Stip. ¶ 60, one between UNITE and the plaintiffs, *see id.* Ex. O, and the other between UNITE and Dillard's and its counsel, *see id.* Ex. P. In the agreement with the plaintiffs, UNITE agreed to permanently expunge from its records all of the plaintiffs' personal information that it "obtained by the actions complained of in the lawsuit," *i.e.*, tagging. *See id.* Ex. O at ¶ 3. UNITE fulfilled this

36. When plaintiffs' counsel asked Garren if he had discussed with Raynor "what the Tarkington lawsuit was about," UNITE's counsel did not permit Garren to respond, citing grounds of attorney-client privilege. *See* Pls.' Mem. Ex. 3 Garren Dep. 84:10-15.

obligation. *See* Pls.' Mem. Ex. 1 Bennett Dep. 225:7-14, 228:17-229:21; Ex. 23 Garren Dep. 60:9-18.

Jason Coulter, UNITE's Assistant National Organizing Director, testified that he and Ernest Bennett, UNITE's International Vice-President and Director of Organizing, discussed the Dillard's case and "decided to continue to use tags because it was still on occasion a valuable tool for the union to use in organizing workers." Pls.' Mem. Ex. 13 Coulter Dep. 64:7-18. According to Bennett, "[t]he context of the discussion was that we needed to be discreet about using the license plate retrieval although we should continue to, but we needed to be discreet because of Dillard's use in a campaign that undermined our effort." *Id.* Ex. 1 Bennett Dep. 132:23-133:4.

By "discreet," Bennett meant "let's don't run it high profile and blast it out and be careful using it, because we did not want it to be used as a tactic as Dillard used it in the organizing campaign." *Id.* at 133:11-16. Coulter also told organizers to exercise discretion. In light of *Tarkington*, during a 2001 non-Cintas campaign in Arkansas, Coulter testified that he told organizers "to be discreet" because they did not want the company to find out what they were doing. *Id.* Ex. 13, Coulter Dep. 85:2-8. While some people at that campaign knew about the Dillard's campaign, Coulter said they "didn't discuss the Dillard's case, but we discussed that people needed to be thoughtful and careful and discreet." *Id.* at 86:14-16. They wanted to avoid having the company learn that they were preparing an organizing campaign. *Id.* at 85:24-86:5.

E. *This Litigation*

Plaintiffs filed this lawsuit on June 28, 2004, and a few weeks later filed a one-count amended class action complaint alleging that UNITE, Raynor, and the Teamsters violated the Driver's Privacy Protection Act of 1994 ("DPPA" or the "Act"). To remedy these alleged violations, plaintiffs each requested that we award liquidated damages of $2,500, punitive damages, attorneys' fees, costs, and injunctive relief. *See* Am. Compl. at 14. Defendants moved to dismiss the amended complaint, but we denied their motion on October 13, 2004. *See Pichler v. UNITE*, 339 F.Supp.2d 665 (E.D.Pa.2004).

On May 31, 2005, we granted plaintiffs' motion for class certification with respect to UNITE, denied it with respect to Raynor and the Teamsters, defined a class as against UNITE,[37] and appointed class counsel. *See Pichler v. UNITE*, 228 F.R.D. 230, 260-61 (E.D.Pa.2005). The class, certified under Fed. R.Civ. P. 23(b)(1)(A), consists of:

> All persons whose personal information from motor vehicle records was knowingly obtained,

---

37. We certified a class pursuant to Fed.R.Civ.P. 23(b)(3), *see Pichler v. UNITE*, 228 F.R.D. 230, 260 (E.D.Pa.2005), and later, upon agreement of the parties, amended the class definition to extend the class period until October 13, 2004, *see* Order of Dec. 14, 2005. The parties then agreed that the class should be certified pursuant to Fed.R.Civ.P. 23(b)(1)(A), rather than Fed.R.Civ.P. 23(b)(3). Pursuant to their stipulation and Fed.R.Civ.P. 23(c)(1)(C), we re-certified the class under Fed.R.Civ.P. 23(b)(1)(A). *See* Order of Feb. 9, 2006.

> used, and/or disclosed, directly or indirectly, by UNITE or UNITE HERE between July 1, 2002 and October 13, 2004, as part of an effort to contact Cintas Corporation employees[.]

See Order of Feb. 9, 2006. On September 23, 2005, we approved a Consent Order between plaintiffs and the Teamsters settling claims between them and dismissing this action as against the Teamsters only.

Following completion of discovery, the parties submitted their cross-motions for summary judgment, as well as their stipulations of fact. We now address those motions.[38]

III. *Legal Analysis*

After setting forth the relevant statutory provisions, we will consider the motions with respect to UNITE, and then turn to Bruce Raynor.

A. *The DPPA*

Unless one of its exceptions applies, the DPPA forbids state officials from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity . . . personal information . . . about any individual obtained by the department [of motor vehicles] in

---

38. UNITE revisits the issue of the DPPA's state of mind requirement, a matter upon which we have already ruled. *See Pichler v. UNITE*, 228 F.R.D. 230, 241-42 (E.D.Pa.2005). We shall therefore not reconsider that issue.

connection with a motor vehicle record." 18 U.S.C. § 2721(a)(1) (2006). It also prohibits others from knowingly "obtain[ing] or disclos[ing] personal information, from a motor vehicle record" for an unlawful purpose and from "mak[ing] false representation[s] to obtain any personal information from an individual's motor vehicle record." 18 U.S.C. § 2722(a), (b).

Section 2724 provides for a civil cause of action: "A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court." 18 U.S.C. § 2724(a).

Section 2721 lists fourteen exceptions to the DPPA, two of which are at issue here. The Act authorizes access:

> For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4) (the "litigation exception"). It also authorizes access "[f]or use by any government agency, including any court or law enforcement agency, in

carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. § 2721(b)(1) (the "acting on behalf of a government agency exception").

If a defendant is found liable, the court "may" award—

> (1) actual damages, but not less than liquidated damages in the amount of $2,500;
>
> (2) punitive damages upon proof of willful or reckless disregard of the law;
>
> (3) reasonable attorneys' fees and other litigation costs reasonably incurred; and
>
> (4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2724(b).

In our decision on class certification, we held that:

> to be eligible to recover under the DPPA, a plaintiff must prove that (1) the defendant knowingly obtained, disclosed, or used personal information from her motor vehicle records; and (2) the purpose of such obtaining, disclosure, or use was not permissible. The plaintiff need not show that the defendant

> knew that the obtaining, disclosure, or use was impermissible.

Pichler v. UNITE, 228 F.R.D. 230, 242 (E.D.Pa.2005).

B. *UNITE*

Before we consider whether the DPPA provides an exception for UNITE's actions, we must address an important issue of statutory construction. One section in UNITE's brief contends that plaintiffs cannot prove it violated the Act "if at least one of the purposes for which UNITE acquired motor vehicle information was lawful." UNITE's Mem. 29 C. (format altered). Plaintiffs dispute such a construction and contend that "liability does not result from the *absence* of any permitted purpose, as Defendants declare, but from the *existence* of 'a purpose not permitted.' " Pls.' Mem. of Law in Opp'n to Defs.' Mots. for Summ. J. ("Pls.' Opp'n") at 16.

Section 2724 provides that "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, *for a purpose not permitted* under this chapter shall be liable. . . ." 18 U.S.C. § 2724(a) (emphasis added). Thus, one who obtains information is liable each time one gets information "for a purpose not permitted." Accordingly, if UNITE had three purposes for "obtain[ing], disclos[ing] or us[ing] [plaintiffs'] personal information" and two of those were "permissible uses" but the third was not, UNITE would still be liable for the third purpose. The Act contains no language that would

excuse an impermissible use merely because it was executed in conjunction with a permissible use.[39]

We now consider the purposes for which UNITE is said to have obtained plaintiffs' personal information. As will be seen, on this record the question of partially permissible uses is not pertinent because there was no permissible use.

1. *Organizing Workers*

Plaintiffs contend that UNITE is liable because the DPPA does not recognize a unionizing campaign as a permissible use. UNITE revisits its argument that the DPPA is inapplicable to union organizing activity because of the NLRB's primary jurisdiction. *See* UNITE's Mem. 44-51. Having already ruled on this issue, *see Pichler v. UNITE*, 339 F.Supp.2d 665, 668-70 (E.D.Pa.2004), we shall not reconsider it now.

The DPPA lists fourteen permissible purposes in Section 2721(b); union organizing is not one of them. As we have already held, we will not engraft upon the DPPA a "labor exception" that would permit unions to acquire and use employees' personal information, obtained from

---

39. We note that this reading is consistent with how at least one Pennsylvania court has interpreted the DPPA. *See Hartman v. Dept. of Conservation & Natural Resources*, 892 A.2d 897, 904-05 (Pa.Commw.Ct.2006) (finding that DPPA did not permit disclosure of personal information where main purpose of using the information was not permitted, even though there was another possibly permissible use effected at the same time).

motor vehicle records, to contact them during organizing campaigns. *Pichler v. UNITE*, 339 F.Supp.2d 665, 669-70 (E.D.Pa.2004). Congress may amend Section 2721(b), but we cannot.

The parties have stipulated that UNITE was conducting a campaign to organize and unionize Cintas workers, and that "to contact workers as part of UNITE's organizing campaign," it compiled lists of Cintas workers. *See* Stip. ¶ 29; *see also* ¶¶ 14, 21. One method to build these lists was "access[ing] information contained in state motor vehicle records relating to those license plate numbers" that were "on cars found in Cintas parking lots." Stip. ¶ 30. "With respect to the Cintas campaign, UNITE accessed the motor vehicle records of the named Plaintiffs and a plaintiff class estimated by Plaintiffs and Cintas to consist of between approximately 1758 and 2005 Cintas employees, or relatives or friends of Cintas employees." *Id.* ¶ 32.

These stipulations leave no doubt that UNITE's tagging was done to further its organizing campaign. Because Congress did not designate union organizing as a permissible use under the DPPA, we hold that UNITE is liable to plaintiffs under Section 2724(a).

As noted, without the imagined "labor exception" UNITE still claims safe harbors in two statutory exceptions. But as we now explain, UNITE's activities were not done "in anticipation of litigation" or "on behalf of a [government] agency" within the meaning of the DPPA. We now turn to the parties' arguments concerning those two exceptions.

2. The Litigation Exception

According to UNITE, the record establishes that it acquired and used personal information of the putative *Pichler* class members in connection with an investigation in anticipation of litigation within the meaning of Section 2721(b)(4) of the DPPA. *See* UNITE's Mem. 30-36. Plaintiffs, in turn, characterize UNITE's actions as a "mass solicitation of claims in pursuit of [its] union organizing campaign." Pls.' Mem. 36.

For the litigation exception to apply, we have held that there must be an actual investigation, litigation must appear likely at the time of the investigation, and the protected information acquired during the investigation must be of "use" in the litigation, meaning that there was "a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding." *Pichler v. UNITE*, 339 F.Supp.2d 665, 668 (E.D.Pa.2004). We understand that "litigation" "encompass[es] all manner of proceedings identified in § 2721(b)(4), including Board proceedings." *Id.* As we explained, "[t]his construction ensures that individuals' statutorily recognized rights to the privacy of their motor vehicle records are not sacrificed whenever a litigant raises the possibility of a tenuous connection between the protected information and issues tangentially related to a conceivable litigation strategy." *Id.*

Appendix C

UNITE asserts that it satisfies our litigation exception criteria for three reasons. First, an undisputed objective and goal of the Cintas campaign was to investigate and initiate court cases. Second, litigation appeared likely because Cintas's workforce was largely minority and female and because UNITE's pre-campaign investigation revealed prior discrimination complaints that Cintas employees had filed, namely forty cases alleging unlawful discrimination, as well as forty-two unfair labor practice charges against Cintas and its subsidiaries from 1998 through 2001. *See* UNITE's Mem. Qadeer Decl. ¶ 4 May 12, 2006. Third, it was reasonably likely that the EEOC, as well as state and local agencies, would need to know which employees suffered discrimination or other labor law violations or knew of those who had.

UNITE contends that, given its knowledge of Cintas's labor law violations, it needed "to contact Cintas employees at home to investigate whether they were the victims of unlawful employment discrimination or overtime violations or had evidence to support those that had already filed such charges." UNITE's Mem. 33. UNITE highlights the *Ramirez* class action, a Title VII case alleging race, ethnic, and gender discrimination. The lead plaintiff, Robert Ramirez, is a putative class member here, as are three other *Ramirez* plaintiffs. *Id.*, Qadeer Decl. ¶ 16. UNITE claims that its home visits to all class members who are women or minorities were part of the investigation it undertook in anticipation of the *Ramirez* litigation.

UNITE also cites to *Veliz*, the national FLSA overtime class action for Cintas drivers. Named plaintiffs Thomas Riley, Russell Daubert, and Jose Sabastro are or were Cintas drivers who were eligible to participate in *Veliz*, and they all received mail about that litigation. Riley received UNITE's September 23, 2004 letter about *Veliz*, as well as "YES, WE CAN!," a ten-page "newsletter about uniform justice at Cintas" published by UNITE and the Teamsters in March of 2004. UNITE's Mem. Kennedy Decl., May 15, 2006, Ex. C Riley Dep. 12:3-16:1, Dec. 10, 2004; *see also* Stip. Ex. Q "UNIFORM justice!" Sep. 23, 2004; Ex. Z "YES, WE CAN!" Mar. 2004. Sabastro also received mail from the union about *Veliz* and the "YES, WE CAN!" publication. UNITE's Mem. Kennedy Decl. Ex. D Sabastro Dep. 13:5-14:25, 61:3-64:7, Dec. 9, 2004. Daubert received mail about the lawsuit, but did not read the documents or know who sent them, nor did he recall receiving a copy of UNITE's September 23, 2004 letter. *Id.* Ex. B Daubert Dep. 31:6-32:3, Dec. 10, 2004.

Furthermore, UNITE points out that as a result of home visits to seven putative class members, UNITE filled out eight Legal Violation Reports, *see* Stip. ¶ 27, it identified four putative class members as victims of discrimination in the Discrimination Inventory Reports, *see* Qadeer Decl. ¶ 14, and sixteen putative class members executed Consents to Sue to enable them to opt into the *Veliz* litigation, *see id.* ¶ 15. It also worked with the EEOC in submitting discrimination charges and investigated allegations of Cintas violations of OSHA and state environmental regulations.

Appendix C

Plaintiffs submit that the litigation exception, as we have explained it, "can only mean a discrete investigation into a discrete claim or set of claims." Pls.' Mem. 33. In other words, "[f]or ["in anticipation of" of litigation] to have any meaning, it must mean investigating the merits of an actual potential claim, not merely fishing in the speculative hope that you will hook something." Pls.' Opp'n 18. As plaintiffs note, defendants do not allege that they knew whether a person had a claim, or information relevant to a claim, until they spoke with that person. Indeed, defendants have stipulated that they were "*finding* potential legal claims" throughout the Cintas campaign. Stip. ¶ 21 (emphasis added). Plaintiffs also take issue with UNITE's contention that litigation was "likely" because UNITE was aware of eighty-two legal proceedings against Cintas—a number that plaintiffs find unremarkable in a company employing 28,000 workers.

We agree with plaintiffs that UNITE's activities do not come within the DPPA's litigation exception. UNITE was "finding" claims, not investigating them within the meaning of the statute. Litigation was not "likely" in any realistic way. Indeed, UNITE accessed the personal information of 1,758 to 2,005 putative class members, which, as stipulated, resulted in only thirty-one of those people either becoming involved in litigation against Cintas or taking steps toward such actions during the class period. In other words, UNITE had, at best, less than a 1.8% success rate in "finding" legal claims among the putative class members.

UNITE's reading also proves too much. As plaintiffs point out, at any given time large companies such as DuPont or Dow Chemical are sure to be involved in multiple legal proceedings concerning discrimination, wage claims, or pollution. Under UNITE's reading, any union—or for that matter any law firm—could research DuPont or Dow Chemical, learn of past litigation and therefore claim that litigation was "likely." It could then access the personal information of thousands of employees, contact them at their homes, and surely find *some* legal cases to prosecute. We do not believe that Congress drafted the DPPA just so we could eviscerate it by importing such claim trolling into its permissible uses.

Wemhoff v. District of Columbia, 887 A.2d 1004, 1006 (D.C.2005), a case brought under the District of Columbia's Freedom of Information Act, comes to the same conclusion. There, the District's Department of Motor Vehicles ("DMV") denied a lawyer's request to produce the names and address of motorists who had received traffic violations at a certain intersection, because, *inter alia*, it claimed the DPPA prevented such disclosures. *Id.* at 1006. The lawyer wanted this information so that he might solicit people to join a class action he had filed concerning the District's enforcement of traffic laws, and he therefore relied on Section 2721(b)(4)'s "in anticipation of litigation" exception. *Id.* at 1007, 1010-12. The court examined our decision here on the motion to dismiss, 339 F.Supp.2d 665 (E.D.Pa.2004), and held that "[b]ased on *Pichler*, and our own reading of § 2721, acquiring personal

information from the motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b)." *Id.* at 1012.

The DPPA thus does not permit one to acquire and use statutorily proscribed personal information to solicit or find claims. That is all that UNITE's actions amounted to here, and such claim trolling is far short of the concreteness Congress had in mind to remove the DPPA's protection. UNITE therefore cannot take refuge in the litigation exception.

3. *The Acting On Behalf Of A Government Entity Exception*

UNITE also argues that it is a private entity that "act[ed] on behalf of a Federal, State, or local agency in carrying out its functions," a permissible use described in Section 2721(b)(1). UNITE points to its submission of charges of discrimination against Cintas with the federal EEOC, meetings with the EEOC regarding Cintas, information it gave to the EEOC about Cintas, the EEOC's intervention as a plaintiff in *Ramirez* (based on its determination that the case has national significance), and the UNITE campaign plan's legal component. *See* UNITE's Mem. 37, Qadeer Decl. ¶ 18, Hodek Decl. ¶¶ 18-23, May 11, 2006; *see also* Stip. Ex. I Campaign Plan. UNITE states that it was and is playing the role of a "private attorney general" to eradicate discrimination at Cintas. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63, 100 S.Ct. 2024, 64 L.Ed.2d

723 (1980) ("Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority' "). UNITE also filed employment discrimination charges with six states' anti-discrimination agencies. UNITE's Mem. Qadeer Decl. ¶ 20.

As for environmental matters, UNITE brought or assisted in bringing four OSHA complaints, Stip. ¶ 49 E[40]; investigated alleged EPA and OSHA violations at twelve facilities at which putative *Pichler* class members work, *see* UNITE's Mem. Frumin Decl. ¶ 4, May 10, 2006, Ex. E; and intervened in a lawsuit by the Connecticut Attorney General against Cintas to enforce the Clean Water Act, Stip. ¶ 49 B.3, a case that resulted in a 2005 settlement with Cintas, UNITE, and Connecticut's Department of Environmental Protection in which three of four UNITE positions were adopted, *see* UNITE's Mem. Frumin Decl., Ex. N. UNITE also notes that it assisted a Cintas employee—one who left Cintas in July of 2002, before the class period here—to testify at a March 9, 2004 Environmental Protection Agency

---

40. UNITE also claims it assisted employees in filing OSHA complaints at thirty-one Cintas locations. *See* UNITE's Mem. 20. For this proposition, it cites to paragraph four and Exhibit E of the Declaration of Eric Frumin, UNITE's Director of Occupational Health and Safety. UNITE's Mem. Frumin Decl. ¶¶ 1, 4, Ex. E. Frumin declares that he "investigated allegations of EPA violation at Cintas facilities" and provides a log listing thirty-two such facilities. *Id.* at ¶¶ 1, 4. He does not state that he assisted Cintas employees in filing thirty-one OSHA complaints, so we shall not credit this allegation.

regulatory hearing addressing proposed shop towel rules, a hearing UNITE had requested. UNITE's Mem. Frumin Decl. ¶ 3.

As plaintiffs note, UNITE does not connect any of its NLRB complaints to license plate searches. It does not cite any information obtained from home visits to putative class members with information it may have provided to any agency. Indeed, it is unclear which, if any, putative class members were involved with the legal proceedings UNITE identifies. The record simply does not support an inference that UNITE's tagging activities were undertaken on behalf of a government agency. Its self-appointment as agency champion therefore fails.

C. ***Bruce Raynor***

The amended complaint charges Raynor with the same alleged violation of the DPPA as UNITE, "knowingly obtaining, disclosing and/or using Plaintiffs' . . . personal information from motor vehicle records without Plaintiffs' . . . consent, for purposes not permitted by the DPPA." *See* Am. Compl. ¶ 65. It also alleges that he "caused UNITE and others . . . to engage in, as well as personally directed, authorized or otherwise supervised, the unlawful conduct alleged." *Id.* ¶ 19. Moreover, it claims that Raynor "agreed and conspired" with UNITE to commit acts in violation of the DPPA. *Id.* ¶ 66. Since we denied plaintiffs' motion for class certification as against Raynor, each of the plaintiffs must show that he committed the alleged acts as against him or her.

Appendix C

Raynor contends that the record offers no support for the allegations against him. As evidenced from the specific facts brought to our attention, Raynor is correct, and he is therefore entitled to summary judgment. Indeed, plaintiffs seem implicitly to acknowledge this because they now argue that Raynor's liability rests on his turning a "blind eye" to the tagging. They request that, to the extent that Raynor argues this "theory" is different from the amended complaint's allegations, we consider the pleadings amended to conform to the evidence, pursuant to Fed.R.Civ.P. 15(b). Even if we did, plaintiffs' new theory remains unhelpful on this record.

Plaintiffs cite to Raynor's awareness that UNITE had used tagging in the 1970s, *see* Pls.' Mem. Ex. 7 Raynor Dep. 18:4-22:11, his knowledge of the DPPA from the *Tarkington* case, and his awareness that organizers had discretion to tag and his failure to direct them to stop, *see id.* at 31:3-32:23. Based on these facts, they contend that "Raynor's participation and *cooperation* consisted of deliberately turning a blind eye to a practice he knew about and which he knew to be of at best questionable legality under the DPPA." Pls.' Mem. 43.

Plaintiffs now rely on Pennsylvania's participation theory of tort liability:

> The general, if not universal, rule is that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor; but that an officer

> of a corporation who takes no part in the commission of the tort committed by the corporation is not personally liable to third persons for such a tort, nor for the acts of other agents, officers or employees of the corporation in committing it, unless he specifically directed the particular act to be done or participated, or cooperated therein.

Mill Run Associates v. Locke Property Co., Inc., 282 F.Supp.2d 278, 287-88 (E.D.Pa.2003) (quoting *Wicks v. Milzoco Builders, Inc.*, 503 Pa. 614, 470 A.2d 86, 90 (1983)).

Plaintiffs fail to point to anything in the record showing that Raynor "specifically directed . . . or participated, or cooperated" in tagging. Plaintiffs have provided no evidence to rebut Raynor's testimony that, as President, he has not discussed tagging with anyone and has been "uninvolved in what methods were or were not used to obtain information about where workers live." Raynor Mot., Rochman Decl., May 12, 2006, Ex. C Raynor Dep. 63:14-17, *see also id.* at 92:21-93:16.

The other cases upon which plaintiffs rely do not support the proposition that corporate officers are liable for their nonfeasance under this theory. Indeed, the Pennsylvania Supreme Court has made clear that liability under the participation theory "attaches only where the corporate officer is an actor who participates in the wrongful acts . . . [and] corporate officers may be held liable for misfeasance. . . . [but] may not be held

liable for mere nonfeasance." *Wicks v. Milzoco Builders, Inc.*, 503 Pa. 614, 470 A.2d 86, 90 (1983).

Even if Raynor was aware of UNITE's tagging in the 1970s and knew about the DPPA and UNITE's tagging at the time of the *Tarkington* litigation, any failure to stop the tagging of the named plaintiffs' vehicles would amount to nonfeasance, not misfeasance. Thus, he cannot be liable under plaintiffs' newfound theory.

IV. *Federal Rule of Civil Procedure 54(b)*

Under Federal Rule of Civil Procedure 54(b), "when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the . . . parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." We find that there is "no just reason" to delay entry of judgment in favor of the named plaintiffs and against UNITE but not Raynor.[41] Indeed, there is every reason

41. We note UNITE's argument that our acceptance of plaintiffs' understanding of the DPPA's litigation exception would render the named plaintiffs inadequate class representatives and require us to revisit our certification decision. UNITE contends that because it accessed the named plaintiffs' personal information after litigation was underway-namely *Ramirez* and *Veliz*-there "is a factual difference that creates a legally significant distinction between them and most of the absent class members." UNITE's Opp'n 30. UNITE

(Cont'd)

for appellate clarity on the important issues at stake in this test litigation. Although we take comfort in the Eleventh Circuit's acceptance of our reading of the DPPA, *Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209, 1213 n. 3, 1215, n. 5 (11th Cir.2005), these are questions of first impression in our Circuit[42] that should

---

(Cont'd)

contends that plaintiffs' focus on "a discreet investigation into a discreet claim" reading of the permissible uses makes it necessary to examine what litigation was in play when UNITE acquired each plaintiff's personal information.

Since the facts upon which UNITE bases its argument were available at the time of class certification, UNITE should have raised this argument then. Regardless, as plaintiffs point out, UNITE has never argued that it had a different purpose when accessing the named plaintiffs' personal information, or that it treated the named plaintiffs differently than any other people whose information they accessed. As with all the presumed Cintas employees UNITE contacted, it did not know whether the named plaintiffs had information about any legal claims until speaking with them. Finally, "even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Pichler v. UNITE*, 228 F.R.D. 230, 250 (E.D.Pa.2005) (quoting *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir.1994)). Accordingly, we shall not reconsider our class certification decision.

42. At issue in *Kehoe* is the permissible use described in § 2721(b)(12): "For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains." 18 U.S.C. § 2721. We note that, when recently denying the petition

(Cont'd)

be resolved before we turn to the cumbersome and costly machinery of class-wide relief.

Pursuant to Rule 54(b), we shall enter judgment in the amount of $2,500 for each of the named plaintiffs and against UNITE only. We will defer our decisions on all other remedial issues, including those UNITE raises now,[43] as well as the matter of class-wide claims

---

(Cont'd)

for writ of certiorari in *Kehoe*, *see Fidelity Federal Bank & Trust v. Kehoe*, __ U.S. __, 126 S.Ct. 1612, 164 L.Ed.2d 353 (2006), Justice Scalia wrote a concurrence, in which Justice Alito joined. Justice Scalia noted that the case presented an important, and as yet unanswered, legal question: "whether petitioner can be held liable under the Act if it did not know that the State had failed to comply with the Act's 'express consent' requirement." *Id.* Justice Scalia's concern does not touch upon our case because the knowing nature of UNITE's acts is established. Indeed, if there were ever any doubt on this subject, UNITE's participation in *Tarkington* and its resolution removes it. *See supra* at 20-22. Moreover, UNITE invokes different permissible uses to justify its actions-the "acting on behalf of" and "litigation" exception, *see* 18 U.S.C. § 2721(b)(1), (4)-which contain no requirement that any entity obtain a person's "express consent" to access his or her personal information.

43. UNITE presses several arguments regarding remedial issues. First, it contends that we have discretion to limit class damages to an amount below $2,500 and that we should do so in this case. *See* UNITE's Mem. 51-55. Second, UNITE argues that the class action must be dismissed because Fifth Amendment Due Process is violated when statutory liquidated damages recoveries are inflated by incorporation into a class action. *See id.* at 56. Finally, it insists that the Norris-LaGuardia Act, 29 U.S.C. § 104,

(Cont'd)

procedures, until our Court of Appeals has addressed all matters concerning liability.

IV. *Conclusion*

For the reasons discussed herein, we find that UNITE violated the DPPA. We shall therefore grant plaintiffs' motion for summary judgment as against UNITE and enter judgment in the amount of $2,500 for each named plaintiff.[44] We also find that Bruce Raynor is entitled to judgment in his favor, as we are granting his motion.

BY THE COURT:

/s/ Stewart Dalzell, J.

(Cont'd)

deprives us of the jurisdiction to award the injunctive relief that plaintiffs seek. *See id.* at 56-58.

We are also mindful of the relief problem associated with the reality that many class members-said to be in excess of 600, UNITE's Mem. Qadeer Decl. ¶ 13-not only had their motor vehicle information accessed, but also had UNITE home visits as a "use" of that information. Whether such class members suffered one or two statutory violations is an issue we leave for another day after final appellate action.

44. Although the named plaintiffs are entitled to their costs and reasonable attorneys' fees, it may be difficult to parse counsel's services only for the named plaintiffs as opposed to the lawyers' services for the class. Plaintiffs' counsel shall advise us of their views on this parsing question when they file their bill of costs. We of course would prefer that counsel for plaintiffs and UNITE could come to an agreement about the timing of costs and fee submissions.

Appendix C

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

CIVIL ACTION

No. 04-2841

ELIZABETH PICHLER, et al.

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES AFL-CIO), et al.

ORDER

AND NOW, this 30th day of August, 2006, upon consideration of plaintiffs' motion for summary judgment (docket entry #165), UNITE HERE's motion for summary judgment (docket entry #162), Bruce Raynor's motion for summary judgment (docket entry #163), the parties responses to these motions, UNITE's motion for leave to file sur-reply and attached brief (docket entry #181), plaintiffs' motion for leave to file sur-reply and attached brief (docket entry #180), the parties' stipulation of facts, and their supplemental stipulation of facts, and to correct two errors on the docket, and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

Appendix C

1. The Clerk shall AMEND the lead plaintiff's name in the caption to read "ELIZABETH PICHLER" and the fourth remaining plaintiff's name to read "HOLLY MARSTON";

2. Plaintiffs' and UNITE's motions for leave to file sur-reply are GRANTED;

3. Plaintiffs' motion for summary judgment is GRANTED as against UNITE and DENIED as against Raynor;

4. UNITE's motion for summary judgment is DENIED;

5. Raynor's motion for summary judgment is GRANTED;

6. Pursuant to Fed. R. Civ. P. 54(b), we hereby make an express determination that there is no just reason for delay of the entry of judgment as to the named plaintiffs and to Bruce Raynor, and we direct the Clerk to enter judgment in accordance with the accompanying Judgment; and

7. The questions of class-wide and injunctive relief are DEFERRED until final appellate action.

BY THE COURT:

/s/ Stewart Dalzell, J.

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED MAY 31, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 04-2841

ELIZABETH PICHLER, et al.

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES AFL-CIO), et al.

MEMORANDUM

Dalzell, J. May 31, 2005

In 2003 and 2004, two labor unions allegedly obtained scores of license plate numbers from cars in the parking lots of a company whose employees they were attempting to organize. Claiming that the unions violated their federally protected privacy rights when they used the license plate numbers to get their names and addresses, the named plaintiffs filed this lawsuit, and their motion for class certification is now before us.

Appendix D

Factual Background

A. *The Cintas Campaign*

Cintas Corporation designs and manufactures corporate uniforms and provides entrance mats, restroom supplies, promotional products, and first aid and safety products for more than 500,000 businesses. Throughout the United States and Canada, Cintas operates 351 facilities that employ more than 28,000 people. *See* http://www.cintas.com/company/corporate_profile/default.asp (last visited May 29, 2005) (on file with the undersigned); *see also* Hart Dep. at 7-8.

Since the fall of 2002, the Union of Needletrades, Industrial & Textile Employees AFL-CIO ("UNITE")[1] has been engaged in a campaign to educate Cintas employees about how to protect their rights under federal and state law (the "Cintas campaign"). In particular, UNITE was concerned with what it characterizes as Cintas's low wages, poor benefits, unsafe working conditions, discriminatory practices, and violations of the Fair Labor Standards Act ("FLSA"),[2] Family Medical Leave Act ("FMLA"),[3] and workers'

1. In July of 2004, UNITE merged with the Hotel Employees and Restaurant Employees International Union ("HERE"), and the combined entity has been known as "UNITE HERE" since then. Mestrich Dep. at 10-11. For the sake of simplicity, we shall refer to the entity that is a defendant in this case as "UNITE."

2. 29 U.S.C. §§ 201-219 (2005).

3. 29 U.S.C. §§ 2601-2654 (2005).

compensation laws. DeMay Dep. at 39-40; *see also* Mestrich Dep. at 132-36. The UNITE organizers believe that employees can best protect their rights by joining a union, DeMay Dep. at 33; Mestrich Dep. at 138-39, and they hoped to unionize 17,000 of Cintas's American employees, Raynor Dep. at 126; Mestrich Dep. at 42-43. Because organizers believed that Cintas's practices were holding down labor standards throughout the laundry industry (one of UNITE's key industries), it was critically important to them that the Cintas campaign succeed. Raynor Dep. at 49-50, 52.

Throughout the campaign, Bruce Raynor has served as UNITE's president. Raynor Dep. at 13. Keith Mestrich has been UNITE's director of strategic affairs since December of 2002, and in that capacity Mestrich has managed many of UNITE's organizing campaigns, including the Cintas campaign. Mestrich Dep. at 9-14; Raynor Dep. at 38. While Raynor and Mestrich focused on union-wide issues, of which the Cintas campaign was one of many, the ground organizing director had primary responsibility for coordinating local efforts on the national Cintas campaign. Jen Roitman was UNITE's ground organizing director on the Cintas campaign from its inception until Liz Gres replaced her in late 2003 or early 2004. DeMay Dep. at 33-34; Mestrich Dep. at 24, 194-196; Raynor Dep. at 70, 139, 189.

The Cintas campaign focused on seven metropolitan areas: New York City, Philadelphia, Detroit, Chicago, Las Vegas, Northern California, and Toronto. Mestrich Dep. at 38; *see also* Qadeer Aff. ¶ 7. In each of these

metropolitan areas, a site coordinator directed UNITE's day-to-date organizing activities. For example, Megan Chambers was the New York site coordinator, Mike Scimone coordinated UNITE's efforts in and around Philadelphia, and Peter DeMay oversaw the Cintas campaign in Chicago. *See* Raynor Dep. at 144-45; DeMay Dep. at 33-35.

By the spring of 2003, UNITE had invested more than one million dollars in the Cintas campaign. Raynor Dep. at 131. UNITE spent some of these funds supporting *Veliz v. Cintas Corp.*, No. 03-1140 (N.D.Cal.). Raynor Dep. at 73-74; Mestrich Dep. at 175. Filed on March 19, 2003, *Veliz* was a class action lawsuit alleging that Cintas violated the FLSA by not paying its drivers overtime. Qadeer Aff. ¶ 18; *see also* Raynor Dep. at 84, 87.[4] Around the same time, Cintas hired Burson Marsteller, a public relations firm, to combat the negative publicity that it was receiving from UNITE's organizing campaign. *See* Gates Dep. at 4, 8, 12.

B. *Teamsters Join Campaign*

When UNITE organizers contacted Cintas employees, many drivers expressed a preference to speak with the International Brotherhood of Teamsters AFL-CIO (the "Teamsters"). Mestrich Dep. at 18-19. Although UNITE already represented production workers at some Cintas facilities and would have been

---

4. As of March 22, 2005, more than 2,400 individuals had opted in to the *Veliz* class. Qadeer Aff. ¶ 18.

willing to organize all of Cintas's workers, including the drivers, the UNITE organizers recognized that the Teamsters already represented some Cintas drivers. Mestrich Dep. at 189-90; Raynor Dep. at 75-76, 79. Thus, Mestrich contacted Jeff Farmer, the Teamsters' director of organizing, in the spring of 2003 to explore the possibility of the two unions collaborating. Mestrich Dep. at 17-18.

Ultimately, on May 6, 2003, UNITE and the Teamsters agreed to "combine [ ] resources . . . in a coordinated fashion to win union representation and good collective bargaining agreements for Cintas employees." Rosen Decl. Ex. 7, ¶ 1. Under the terms of their agreement, UNITE obtained "exclusive jurisdiction" to organize "inside production and warehouse employees" while the Teamsters concentrated on "drivers, drivers' helpers, loaders at depots and vehicle mechanics." Rosen Decl. Ex. 7, ¶ 3(A). A Coordinating Committee, composed of three members from each union, controlled the direction of the joint campaign, but the Campaign Director, whom UNITE selected, controlled the campaign's day-to-day operations.[5] Rosen Decl. Ex. 7, ¶ 4. UNITE agreed to pay sixty percent of the campaign's costs, and the Teamsters agreed to pay the remaining forty percent of the costs. Rosen Decl. Ex. 7, ¶ 5.

---

5. Mestrich, Gres, and Ahmer Qadeer represented UNITE on the Coordinating Committee, and the Teamsters selected Farmer and two others as their representatives. Raynor Dep. at 139.

C. *Importance of Home Visits*

As part of the campaign, UNITE contacted Cintas employees to further investigate concerns of which it had already learned, to identify other allegedly problematic working conditions at Cintas, and to gauge the employees' interest in unionizing. *See* Mestrich Dep. at 199. UNITE also hoped to find additional employees willing to join either the *Veliz* class or another class action lawsuit pending against Cintas.[6] DeMay Dep. at 51, 89.

Though organizers needed to make contact, they believed that Cintas employees would not speak with them on Cintas's premises because they feared that Cintas management would retaliate against employees who consorted with the union. To put them more at ease, UNITE's organizers decided to visit employees at their homes. Qadeer Aff. ¶ 9. Before they could make any home visits, however, organizers needed to compile a list of employees' names and addresses.

D. *UNITE Contacts Employees from Emmaus Plant*

UNITE got names and addresses of Cintas employees from a variety of sources, including telephone directories, public records, internet databases, and

---

6. The second suit, *Ramirez v. Cintas Corp.*, No. 04-281 (N.D.Cal.), alleges that Cintas discriminates against its employees based on race, national origin, and sex. *Rameriz* was filed in January of 2004. Qadeer Aff. ¶ 13.

other employees. Mestrich Dep. at 29-31. Most significantly for purposes of this case, UNITE also obtained some employees' names and addresses from motor vehicle records, a practice that it had employed occasionally at least since the 1970s.[7] Mestrich Dep. at 199-200; Raynor Dep. at 19. In the Cintas campaign, the site coordinators for each of the seven targeted metropolitan areas exercised discretion on whether to use motor vehicle records to help build their contact lists, so there was no uniform UNITE practice throughout the nation. Raynor Dep. at 31-32; Mestrich Dep. at 45-46, 101-02; DeMay Dep. at 61.

The named plaintiffs in this case are all connected in some way to Cintas's plant in Emmaus, Pennsylvania, and Mike Scimone was the site coordinator responsible for UNITE's campaign there. Mestrich Dep. at 91, 128-29. At that plant, UNITE organizers recorded the license plate numbers of the vehicles parked in the lot. Mestrich Dep. at 48. Nick Atkins collected the lists of plate numbers and then provided a master list to Mike Scimone.[8] *See* Mestrich Dep. at 52. Scimone, in turn, forwarded the license plate numbers to Peter DeMay, the Chicago site coordinator. DeMay Dep. at 74-75.

---

7. The practice persisted in spite of the fact that it was relatively inaccurate and expensive. Mestrich Dep. at 45-46; DeMay Dep. at 49-50; Raynor Dep. at 60-61.

8. To maximize the likelihood that they were recording employees' license plates-and not the plates of one-time visitors-Atkins verified that organizers had recorded each license plate number twice before he added it to the master list that he provided to Scimone. *See* Mestrich Dep. at 77.

Appendix D

DeMay had the ability to obtain the names and addresses of the individuals to whom particular license plates were registered. For some states' license plates, DeMay could obtain registrants' names and addresses by searching Westlaw. Mestrich Dep. at 53; DeMay Dep. at 32-33, 42-45.[9] Westlaw, however, did not include motor vehicle registration information for other states, including Pennsylvania. When DeMay could not retrieve the necessary information from Westlaw, he asked John Rea, a private investigator, to get it.[10] Mestrich Dep. at 54-57.

---

9. Westlaw requires users to state the purpose for which they are searching motor vehicle records by checking one of a limited number of boxes. When he used Westlaw to search for Cintas employees' names and addresses, DeMay checked the box for "skip tracing" or the box for "litigation" at "random." DeMay Dep. at 102-05.

10. For example, Rea investigated some Illinois license plates when DeMay needed more up-to-date information than was available through Westlaw. *See* DeMay Dep. at 45-46, 62-63. Rea obtained the information from Infotrack, an information broker. Rea Dep. at 19-20, 26; *see also* Rea Dep. Ex. 4.

When Megan Chambers, the New York site coordinator, needed help finding the names and addresses associated with license plates that her staff had recorded, she contacted DeMay, and DeMay put her in touch with Rea. DeMay Dep. at 54, 60. Rea obtained the information with the assistance of another private investigator, Robert Carroll. Rea Dep. at 26, 30; *see also* Rea Dep. Exs. 2-3.

Apart from the Pennsylvania, Illinois, and New York records about which DeMay and Rea testified, UNITE also admits to accessing records from Michigan, Nevada, Indiana, California, Ohio, and Connecticut. Rosen Decl. Ex. 2, at 5.

(Cont'd)

DeMay contacted Rea soon after Scimone asked for help obtaining names and addresses from Pennsylvania license plate numbers. DeMay Dep. at 74-75. On or around December 5, 2003 and January 20, 2004, Scimone sent lists of license plate numbers to DeMay, and DeMay e-mailed the lists to Rea. DeMay Dep. at 82-83; Rea Dep. at 55-60. Rea then faxed the lists to Infotrack. *Id.*; *see also* Rea Dep. Ex. 1, at 523-24; Rea Dep. Ex. 5; Rea Dep. Ex. 1, at 525-26; Rea Dep. Ex. 6.[11] Infotrack passed the lists on to American Investigation Resource ("AIR"), a Pennsylvania private investigator agency, and AIR submitted separate "service requests" to Pennsylvania Auto License Brokers ("PALB") for each of the license plate numbers on the lists. *See, e.g.*, Naccarato Dep. Ex. 4, at 137.

PALB has direct access to the Pennsylvania Department of Transportation's ("PennDOT"'s) computerized database of motor vehicle information. Using the license plate numbers, PALB searched the PennDOT database and obtained vehicle record abstracts for each

---

(Cont'd)

DeMay and other UNITE employees also asked Rea whether he could get motor vehicle information from Connecticut, New Jersey, and California. Rea was unable to obtain information from those states. Rea Dep. at 16-18, 45, 53-54; *see also* Rea Dep. Ex. 1, at 519.

11. Although the cited documents are evidence of the two requests described in the text, Infotrak's invoices to Rea suggest that there may have been other requests for Pennsylvania motor vehicle records made on or around November 14, 2003, November 21, 2003, November 25, 2003, and December 2, 2003. *See* Rea Dep. at 93-104; *see also* Rea Dep. Ex. 8.

of AIR's service requests. *See* Naccarato Dep. at 14-16. A vehicle record abstract includes, among other things, the name and address of the vehicle's registered owner. *See, e.g.*, Naccarato Dep. Ex. 4, at 138. After PALB printed the abstracts, they made their way back to AIR, Infotrack, Rea, DeMay, and finally Scimone.

With the abstracts in hand, Scimone was able to create a spreadsheet of Cintas employees at the Emmaus plant. *See* Rosen Decl. Ex. 26[12]; Mestrich Dep. at 33. Since the spreadsheet included names and addresses, it enabled organizers to visit Cintas employees at their homes to discuss the campaign. Over the weekend of February 7, 2004, the UNITE organizers actually visited many Cintas employees' homes. For example, they went to the residences of Elizabeth Pichler,[13] Kathleen Kelly,[14] Seth

---

12. If there is a license plate number listed in the "Notes1" column of the spreadsheet for a particular employee, then UNITE obtained that employee's name and address through the intricate process described in the text. *See* Mestrich Dep. at 37.

13. *See* Pichler Dep. at 43-45; *see also* Pls.' Deps. Ex. 11, at 462. Pichler is a receptionist at Cintas who drives her own car to work. Pichler Dep. at 7, 42; *see also* Naccarato Dep. Ex. 2, at 21; Rea Dep. Ex. 1, at 531.

14. Although Kelly works in Cintas's stockroom, she drives a car that her boyfriend and housemate, Russell Christian, owns. Kelly Dep. at 5-6, 38; Christian Dep. at 34; *see also* Naccarato Dep. Ex. 2, at 13; Rea Dep. Ex. 1, at 532. When the organizer came to their home, he asked to speak to Christian. Kelly Dep. at 12-16; Christian Dep. at 35-41; *see also* Pls.' Deps. Ex. 11, at 463.

Nye,[15] Russell Daubert,[16] and Kevin Quinn.[17]

---

15. In February of 2004, Nye was a Cintas management trainee who jointly owned his car with his mother, Holly Marston. The address listed on the vehicle's registration was Marston's home address. Nye Dep. at 33; Marston Dep. at 10-12; *see also* Naccarato Dep. Ex. 2, at 23; Rea Dep. Ex. 1, at 528. When a UNITE organizer came Marston's home asking to speak to Nye, she explained that Nye was a management trainee, so the organizer left the residence. Nye Dep. at 11-12, 25; Marston Dep. at 13-15; *see also* Pls.' Deps. Ex. 11, at 468-69.

16. Daubert is a service training coordinator at Cintas. R. Daubert Dep. at 6-7. Service training coordinators are responsible for training Cintas's service sales representatives ("SSRs" or "drivers") and for assisting service managers. At its Emmaus plant, Cintas employs approximately forty SSRs, four service training coordinators, and four service managers. *Id.* at 7-11. The service managers are responsible for maintaining good relationships with Cintas's customers, and they all report to the plant's general manager, Steve Gettins. Quinn Dep. at 7-8.

Daubert denies ever receiving a visit from UNITE organizers, but UNITE's records reflect an attempt to visit him. *Compare* R. Daubert Dep. at 14-15 *with* Pls.' Deps. Ex. 11, at 465. Although Daubert claims that the car that he drove to work was registered jointly in his and his wife's names, the vehicle record abstract lists only him as an owner. *Compare* R. Daubert Dep. at 14; C. Daubert Dep. at 25-26 *with* Rea Dep. Ex. 1, at 527; Naccarato Dep. Ex. 4, at 126.

17. Quinn, a service manager who is the sole owner of the car that he drives to work, received a visit from two female UNITE organizers. Quinn Dep. at 7, 54; *see also* Pls.' Deps. Ex. 11, at 466; Naccarato Dep. Ex. 2, at 15; Rea Dep. Ex. 1, at 529. Although the Teamsters maintain a housecall form indicating that James Kane

(Cont'd)

Appendix D

E. *Teamsters Contact Employees from Emmaus Plant*

While UNITE attempted to reach Cintas's production workers, the Teamsters concentrated solely on organizing drivers. By early 2004, when the campaign at the Emmaus plant was in full swing, the *Veliz* litigation had been pending for nine months, and Cintas had produced two lists of its drivers' names in connection with that litigation. *See* Pls.' Deps. Ex. 1. Both of these lists were organized by plant, and Iain Gold, an employee in the Teamsters' organizing department, was able to use them to create a single list of all drivers at the Emmaus plant. *See* Kane Dep. at 32-33, 77; *compare* Pls.' Deps. Ex. 1-A, at 55; Pls.' Deps. Ex. 1-B, at 160-61 *with* Pls.' Deps. Ex. 4, at 227-28. After he created the list of Emmaus drivers, Gold e-mailed it to James Kane, the Teamsters' lead ground coordinator, who was working in Pennsylvania in early 2004.[18] *See* Pls.' Deps. Ex. 4, at 222; Kane Dep. at 41-42, 133. Gold's list only included drivers' names, and Kane found their addresses by checking union cards that the Teamsters had kept on file since 1998 and by using internet search engines.

(Cont'd)

also visited Quinn, *see* Pls.' Deps. Ex. 5, Quinn does not recall a man visiting his home, and Kane stated that he received the information on the sheet from the UNITE organizers, Kane Dep. at 148-151.

18. Although Cintas has multiple plants in Pennsylvania, the Teamsters only attempted to organize drivers at the Emmaus plant. Kane Dep. at 43, 98-99.

Kane Dep. at 77-82; *see* Pls.' Deps. Exs. 2, 3; Pls.' Deps. Ex. 4, at 221.[19]

On February 8, 2004, while the UNITE organizers were attempting to visit Cintas employees, Kane and Brad Yeakel also made house calls to the drivers on the list that they received from Gold. Kane Dep. at 43, 151-52, 205. That afternoon, they went to Thomas Riley's home and asked his wife, Amy, if they could speak with him.[20] A. Riley Dep. at 10-11. As soon as Thomas Riley realized that the visitors were union organizers, he asked them to leave, and they complied with his request. T. Riley Dep. at 47-50; *see also* Pls.' Deps. Ex. 5. Riley then called Jose Luis Sabastro, another driver,[21] to find out if the Teamsters had contacted him yet. *Id.* at 27-28. Although they had not yet arrived, Kane and Yeakel soon contacted Sabastro at his residence.[22] J. Sabastro Dep. at 24-26, 39, 45; D. Sabastro

---

19. Around September of 2004, the Teamsters obtained additional addresses from an outside company (perhaps Lexis) for use in a mailing, but that company did not access motor vehicle records. Kane Dep. at 83-84, 126, 190; *see also* Qadeer Aff. Ex. BB.

20. Thomas and Amy Riley are the joint owners of the car that Thomas drives to the Cintas plant. T. Riley Dep. at 51-52; A. Riley Dep. at 27-28; *see also* Naccarato Dep. Ex. 2, at 19. Their telephone number is unlisted. T. Riley Dep. at 31; A. Riley Dep. at 12.

21. Although Riley and Sabastro were both drivers in February of 2004, they have since been promoted to service training coordinators. *See* T. Riley Dep. at 5; J. Sabastro Dep. at 5-6.

22. Sabastro is the sole owner of the car that he drives to work. D. Sabastro Dep. at 15-16; *see also* Naccarato Dep. Ex. 2, at 17; Rea Dep. Ex. 1, at 530. His telephone number is unlisted. *See* D. Sabastro Dep. at 14.

at 16-18; *see also* Pls.' Deps. Ex. 5. After these visits, the Teamsters shared the information that they collected with UNITE. Kane Dep. at 157-58, 161, 207-08; *see also* Pls.' Deps. Exs. 7, 8.

F. *This Litigation*

On Monday, February 9, 2004, Pichler, Quinn, Thomas Riley, and Jose Sabastro asked Amy Baker, Cintas's human resources representative at the Emmaus plant, how the unions could have obtained their home addresses.[23] *See* Pichler Dep. at 19-20; Quinn Dep. at 22; T. Riley Dep. at 10, 33-35; J. Sabastro Dep. at 23-24; *see also* Hart Dep. at 46-48. Though Baker could not provide an explanation at that time, she later contacted the employees to inform them that, if they were interested, they would have the opportunity to meet with a lawyer at the Emmaus plant. *See* Pichler Dep. at 19-21; T. Riley Dep. at 35; J. Sabastro Dep. at 29-30; Kelly Dep. at 10-11, 20; Nye Dep. at 12.[24] When he learned of the employee complaints, Jeffrey I. Kohn, Esq., of O'Melveny & Myers, Cintas's outside counsel, contacted Paul R. Rosen, Esq., of Spector Gadon & Rosen, P.C. ("Spector Gadon") to inquire whether he had any interest in representing the employees. Rosen Decl. ¶¶ 3-4.

---

23. Kelly and Nye raised similar concerns with their supervisors. *See* Kelly Dep. at 15-16; Nye Dep. at 15.

24. Thomas Riley—not Baker—informed Russell Daubert of the lawyers' visit. R. Daubert Dep. at 37. Quinn does not recall how he learned of the meeting. Quinn Dep. at 32.

Appendix D

One afternoon in April of 2004, Pichler, Deborah Brown, Kelly, Nye, Quinn, Russell Daubert, Thomas Riley, and Jose Sabastro (collectively, the "employee plaintiffs") met with Kohn and James Bucci, Esq., of Spector Gadon. Kohn introduced himself and asked the employees to describe their encounters with the union organizers. When they had finished, Kohn introduced Bucci and then left the conference room. In all, the meeting lasted about one hour. Hart Dep. at 85-87; Pichler Dep. at 21-23; Kelly Dep. at 8-9, 20-21; Nye Dep. at 10; Quinn Dep. at 26, 31, 35; R. Daubert Dep. at 37; T. Riley Dep. at 42-44; J. Sabastro Dep. at 31-37. Soon after the meeting, Bucci contacted Christian, Marston, Carri Daubert, Amy Riley, and Deborah Sabastro (collectively, the "non-employee plaintiffs" and, together with the employee plaintiffs, the "plaintiffs") by telephone. Christian Dep. at 10-12, 16-17; Marston Dep. at 22; A. Riley Dep. at 19-20; D. Sabastro Dep. at 26.[25]

Eventually, each of the plaintiffs retained Spector Gadon to represent him or her in a lawsuit against UNITE and the Teamsters. *See* Kennedy Decl. Ex. U. Spector Gadon's contingent fee agreements provided that "none of the individual plaintiffs [would] be exposed to any legal fees or costs throughout the prosecution of the case" because Cintas agreed to "advance [Spector Gadon's] fees and costs at [its] normal billing rates."[26]

---

25. Carri Daubert did not report discussing the union organizers' visit to Bucci, but she did retain Bucci to represent her. *See* C. Daubert Dep. at 18.

26. Cintas claims to have advanced Spector Gadon's fees and costs because it wanted to provide its employees with a way to protect their privacy. Hart Dep. at 75-76.

Rosen Decl. Ex. 12, at 1. If the plaintiffs prevail, then Spector Gadon will "reimburse Cintas . . . solely from the attorneys' fees and costs [that it] receive[s] from the plaintiffs, up to the amount Cintas . . . advance[d]." *Id.* In spite of this financing relationship, Cintas agreed to "respect[ ] and . . . not interfere with [Spector Gadon's] attorney-client relationship with the plaintiffs or the independence of [its] professional judgment, particularly with regard to the handling of [the litigation] in the best interests of the plaintiffs." *Id.*, at 2. Spector Gadon promised to "consult with Cintas on a periodic basis to discuss the costs associated with anticipated legal actions." *Id.* Aside from this case, Cintas and Spector Gadon have had no business dealings. Hart Dep. at 69.

On June 28, 2004, Spector Gadon initiated this lawsuit by filing a complaint on behalf of the plaintiffs.[27] A few weeks later, the plaintiffs filed a one-count amended class action complaint alleging that UNITE, Raynor, and the Teamsters violated the Driver's Privacy Protection Act of 1994 ("DPPA" or the "Act").[28] To remedy these violations, plaintiffs each requested that we award liquidated damages of $2,500, punitive

27. Although Cintas maintains that it did not review the complaint before it was filed, *see* Hart Dep. at 84, its public relations agent, Wade Gates of Burson Marsteller, did review the complaint and discussed it with at least one Cintas employee, *see* Hart Dep. at 34, 177. Gates drafted a press release that Spector Gadon issued after it filed the complaint. *See* Gates Dep. at 56-60.

28. 18 U.S.C. §§ 2721-2725 (2005).

damages, attorneys' fees, costs, and injunctive relief. *See* Am. Compl. at 14. The defendants moved to dismiss the amended complaint, but we denied their motions. *See Pichler v. UNITE*, 339 F.Supp.2d 665 (E.D.Pa.2004). Until it received notice of this suit, UNITE was not aware of the DPPA, but it has since stopped using license plate numbers in connection with its organizing efforts at Cintas and elsewhere. Raynor Dep. at 25; Mestrich Dep. at 116-17.

While the parties were engaged in class action discovery, Cintas and the plaintiffs entered into a "common interest agreement" purporting to extend the attorney-client privilege and work product privilege to any materials that they shared with each other. *See* Rosen Decl. Ex. 13. Deborah Brown also stipulated to the dismissal without prejudice of her claims against the defendants. During this same period, more than one hundred people from twenty-three states contacted Spector Gadon to express interest in joining the class. Friedman Decl. ¶ 3; *see also* Hart Dep. at 76. Now that the parties have completed class action discovery, we must consider plaintiffs' motion for class certification.

Analysis

A. *DPAA*

Unless one of its exceptions applies, the DPPA forbids state officials from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by

the department [of motor vehicles] in connection with a motor vehicle record." 18 U.S.C. § 2721(a) (2005). It also prohibits others from knowingly "obtain[ing] or disclos [ing] personal information[ ], from a motor vehicle record" for an unlawful purpose and from "mak[ing] false representation[s] to obtain any personal information from an individual's motor vehicle record." § 2722(b). Those who "knowingly obtain[ ], disclose[ ] or use[ ] personal information, from a motor vehicle record" are "liable to the individual to whom the information pertains." § 2724(a). If a defendant is found liable, the court "may" award:

> (1) actual damages, but not less than liquidated damages in the amount of $2,500;
>
> (2) punitive damages upon proof of willful or reckless disregard of the law;
>
> (3) reasonable attorneys' fees and other litigation costs reasonably incurred; and
>
> (4) such other preliminary and equitable relief as the court determines to be appropriate.

§ 2724(b). Since we cannot begin to address many of the issues that the motion for class certification raises without a clear understanding of the Act, we shall first consider three features of the DPPA that are of particular importance to this case.

Appendix D

1. *Standing*

"In every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified School Dist. v. Newton*, 542 U.S. 1, 124 S.Ct. 2301, 2308, 159 L.Ed.2d 98 (2004). Questions of standing involve "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). Though this case does not implicate any prudential considerations, we must address whether the Constitution would permit us to consider the claims of all of the plaintiffs. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 607, 107 L.Ed.2d 603 (1990) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines.") (quotations and alterations omitted).

The Supreme Court has summarized three elements that constitute the "irreducible constitutional minimum of standing" as:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the

> challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (quotations, alterations, and citations omitted). The defendants have not suggested that any of these three elements may be lacking, so they apparently believe that all are present here. Nevertheless, we must consider whether all of the plaintiffs have suffered an "invasion of a legally protected interest."

The DPPA provides a private cause of action to "the individual to whom [unlawfully obtained, disclosed, or used] information pertains." *See* 18 U.S.C. § 2724(a) (2005). If the information does not "pertain" to an individual, then that individual may not sue under the DPPA. In other words, the only "interest" that the DPPA protects is an individual's interest in the privacy of motor vehicle records that include information about her. If a motor vehicle record does not include information about a person, then that person has no "legally protected interest" in the confidentiality of that motor vehicle record.

The problem for three of the plaintiffs should be apparent. Though Kathy Kelly is a Cintas employee, UNITE did not obtain any personal information about

her from motor vehicle records. UNITE did obtain information about Russell Christian, her boyfriend and housemate, but Christian's vehicle record abstract does not refer to Kelly. Similarly, Carri Daubert and Deborah Sabastro were not the registered owners of the vehicles about which UNITE obtained information. While UNITE may have invaded their husbands' privacy when it obtained vehicle record abstracts for cars registered to their husbands, it could not have violated Carri Daubert and Deborah Sabastro's own DPPA-protected privacy interests because the motor vehicle abstracts contain no information about them. Even under their theory of the case, Kathy Kelly, Carri Daubert, and Deborah Sabastro suffered no invasion of an interest that the DPPA protects, so they lack standing to sue under the DPPA.

2. *State of Mind*

Under the DPPA, a "person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable" to the person whose personal information was accessed. 18 U.S.C. § 2724(a) (2005). From this language, the Teamsters argue that they cannot be held liable unless they (1) knowingly obtained, disclosed, or used personal information; (2) knew that the information was from motor vehicle records; and (3) knew that the purpose for which the information was obtained, disclosed, or used was impermissible. *See* Teamsters's Mem. at 10 n. 15. Plaintiffs concede that they must prove that the Teamsters knowingly obtained,

disclosed, or used the information and that the Teamsters knew the information came from motor vehicle records, but plaintiffs insist that they need not prove that the Teamsters knew that it was illegal to obtain, disclose, or use the information. *See* Pls.' Reply at 7-9 & n. 8.

The structure of § 2724(a) and the location of the adverb "knowingly" within that structure suggest that Congress intended to limit the reach of the knowledge requirement. The relevant portion of § 2724(a) includes three clauses: (1) "obtains, discloses or uses personal information" (the "first clause"); (2) "from a motor vehicle record" (the "second clause"); and (3) "for a purpose not permitted" (the "third clause"). The first clause specifies the acts (obtaining, disclosure, and use of personal information) that the DPPA prohibits, and the second clause modifies the first clause by limiting the relevant kind of "personal information" to information "from a motor vehicle record." In this way, the first and second clauses work together to establish the "act" element that a plaintiff must prove to recover under the DPPA. The third clause, on the other hand, creates an independent "purpose" element, representing the second half of a plaintiff's burden of proof on DPPA liability.

Recognizing that § 2724(a) articulates an act element and a purpose element, we must discern whether Congress intended for the word "knowingly" to reach both elements (as the Teamsters argue) or only the former (as plaintiffs contend). In this regard, we find

the location of the adverb "knowingly" to be significant. Congress placed "knowingly" immediately before three verbs ("obtains, discloses or uses"), and the most natural reading of the text limits the reach of that adverb to the verbs adjacent to it. If Congress had intended for "knowingly" to refer not only to the act element but also to the purpose element—so as to proscribe only those acts done for a purpose not "knowingly" permitted—it would have been odd to locate the word "knowingly" at such a remove from the purpose element.

If one could not violate the DPPA without "knowing [ ]" that the purpose for which he "obtain[ed]," "disclose[d]" or "use[d]" motor vehicle information was unlawful, then every defendant would get at least one free bite at the violation-of-privacy apple. After all, anyone could claim that he did not "know" his purpose to be impermissible until a court interpreted the DPPA to proscribe that purpose. Even after such a ruling, a defendant could manufacture a slightly different purpose for his conduct and then claim ignorance of whether the DPPA prohibited the new purpose. A plaintiff could recover only if the defendant repeatedly violated her privacy and lacked sufficient creativity to conjure up some conceivable purpose that no court had yet considered.

Since defendants have not provided any evidence that Congress intended such a strange result, we hold that, to be eligible to recover under the DPPA, a plaintiff must prove that (1) the defendant knowingly obtained, disclosed, or used personal information from her motor

vehicle records, and (2) the purpose of such obtaining, disclosure, or use was not permissible. The plaintiff need not show that the defendant knew that the obtaining, disclosure, or use was impermissible.[29]

3. *Available Remedies*

If a plaintiff establishes that a defendant violated the DPPA, the court may award "actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724(b)(1) (2005). Plaintiffs contend that this language would permit them to receive the

---

29. We recognize some tension between our holding and *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985). In construing a statute that criminalized "knowingly us[ing], transfer[ing], acquir[ing], alter[ing], or possess[ing] [food stamp] coupons or authorization cards in any manner not authorized by [the statute] or the regulations," 7 U.S.C. § 2024(b)(1) (1977), *Liparota* held that "the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations." *Liparota*, 471 U.S. at 433, 105 S.Ct. at 2092. Apart from the peculiarities of the food stamp statute's text and the absence of any illuminating legislative history for that enactment (neither of which is relevant to this case), the result in *Liparota* depended heavily on the rule of lenity and the principle that "criminal offenses requiring no *mens rea* have a 'generally disfavored status.' " *See id.*, 471 U.S. at 426, 105 S.Ct. at 2088. Since § 2724(a) is not a criminal statute, however, these interpretative principles do not assist us here. Moreover, even in the criminal context, the Court has read *Liparota's* holding as strictly limited to its facts. *See Bryan v. United States*, 524 U.S. 184, 193 & n. 15, 118 S.Ct. 1939, 1946 & n. 15, 141 L.Ed.2d 197 (1998).

greater of either $2,500 or their actual damages. On the other hand, defendants argue that "to recover liquidated damages, plaintiffs must first prove 'actual damages.' " Teamsters's Mem. at 9; *see also* UNITE Mem. at 26-28. Before explaining how we interpret § 2724(b)(1), we shall examine three cases on which defendants rely.

a. *Doe v. Chao*

The first case, *Doe v. Chao*, 540 U.S. 614, 124 S.Ct. 1204, 157 L.Ed.2d 1122 (2004), required the Supreme Court to construe the remedial provisions of the Privacy Act, 5 U.S.C. § 552a (2005). That statute requires the Department of Labor, among other federal agencies, to protect personal information, including Social Security numbers. *See id.* When an agency willfully or intentionally fails to protect one's private information, the Privacy Act makes the United States liable for "actual damages sustained . . . as a result of the . . . failure, but in no case shall a person *entitled to recovery* receive less than the sum of $1,000." § 552a(g)(4)(A) (emphasis added).

In *Doe*, the Department of Labor conceded that it had violated the Privacy Act when it disclosed Doe's Social Security number to others. *See Doe*, 124 S.Ct. at 1206, 124 S.Ct. 1204. Doe sued the Department and submitted uncontroverted evidence that he was "torn . . . all to pieces" and "greatly concerned and worried" about the disclosure. *Id.* at 1207, 124 S.Ct. 1204 (quotations omitted). The district court granted

summary judgment to Doe and awarded $1,000 in statutory damages, but the court of appeals read § 552a(g)(4)(A) to mean that "the $1,000 statutory minimum [was] available only to plaintiffs who suffered actual damages." *Id.* Since Doe made only "conclusory allegations" of emotional distress and "submitted no corroboration . . . , such as evidence of physical symptoms, medical treatment, loss of income, or impact on his behavior," the court of appeals reversed the district court's judgment and concluded that the United States was entitled to summary judgment. *Id.* Relying primarily on the text and legislative history of § 552a(g)(4)(A) and on the common law of torts, the Supreme Court affirmed the court of appeals.

Doe stands for the proposition that a plaintiff seeking relief under the Privacy Act cannot recover the $1,000 minimum award unless he proves "actual damages."[30] Though defendants attempt to extend this holding to the DPPA, two material differences between that Act and the Privacy Act deprive *Doe* of controlling weight here.

First, unlike the Privacy Act, the DPPA does *not* include the phrase "entitled to recovery," which the Supreme Court found to be "critical limiting" language. *See Doe*, 124 S.Ct. at 1212, 124 S.Ct. 1204. The Court focused on the phrase "entitled to recovery" because, if

30. The Court assumed without deciding that a plaintiff could not prove "actual damages" under the Privacy Act if he made only "conclusory allegations" of emotional distress. *Doe*, 124 S.Ct. at 1207, 1212 n. 12.

that language is to have any meaning in the Privacy Act, it must "look[ ] back to the immediately preceding provision for recovering actual damages." *Id.* at 1208, 124 S.Ct. 1204. Moreover, the Court used the common law of torts to ascribe meaning to the phrase "entitled to recovery" and criticized Doe's reading of the Privacy Act for being "at odds with the traditional understanding that tort recovery requires not only wrongful act plus causation reaching to the plaintiff, but proof of some harm for which damages can reasonably be assessed." *Id.* at 1209, 124 S.Ct. 1204. In short, the result in *Doe* turned on the phrase "entitled to recovery," language which the Supreme Court itself recognized as "critical" to the result. Since the DPPA does not use that qualifying language, *Doe* does not control this case.

A second material distinction between the DPPA and the Privacy Act buttresses this conclusion. While the DPPA describes the statutory minimum amount of damages as "liquidated damages," *see* 18 U.S.C. § 2724(b)(1), the Privacy Act states simply that "in no case shall a person entitled to recovery receive less than the sum of $1,000," 5 U.S.C. § 552a(g)(4)(A). As long recognized in the common law of contracts, liquidated damages are "the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damage that will probably ensue from the breach, is *legally recoverable as agreed* damages if the breach occurs." *In re Plywood Co.*, 425 F.2d 151, 154 (3d Cir.1970) (describing New Jersey law); *cf. Pantuso Motors, Inc. v. CoreStates Bank, N.A.*, 568 Pa. 601, 798

A.2d 1277, 1282 (2002) (approving of this definition). Because they avoid the need for judicial inquiry into the amount of damage actually sustained, liquidated damages provisions "serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable." *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411, 68 S.Ct. 123, 126, 92 L.Ed. 32 (1947). Further, "damages are recoverable under a valid liquidated damages provision even though no actual damages are proven as a consequence of that breach." *Pierce Assoc., Inc. v. Nemours Foundation*, 865 F.2d 530, 546 (3d Cir.1988) (describing Delaware law); *cf. Commonwealth, Dep't of Transp. v. Mitchell*, 517 Pa. 203, 535 A.2d 581, 587 n. 2 (1987) ("Once it has been determined that liquidated damages are recoverable under the contract, evidence of actual damage . . . is inadmissible.").

Congress's decision to use the technical term "liquidated damages" in the DPPA suggests that it intended to incorporate the locution's well-understood meaning. In other words, the reference to "liquidated damages" implies that a DPPA plaintiff should receive damages on the same terms as a plaintiff who proves breach of a contract with a reasonable liquidated damages provision. Both are entitled to liquidated damages without proof of actual damages because the stated amount of liquidated damages represents an estimate of the damages that each is likely to suffer from the violation of a legally enforceable right. *Doe*, of course, had no occasion to consider any of these issues because the Privacy Act does not refer to "liquidated damages."

The two key distinctions between the DPPA and the Privacy Act that we have identified explain why *Doe's* holding cannot control our decision in this case. Though not controlling, *Doe* may persuade, and, in that regard, we note some of its dicta that we find helpful here. In explaining its holding, the Supreme Court suggested that, if Congress had intended to permit recovery under the Privacy Act without any showing of actual damages, it "could have accomplished its object simply by providing that the Government would be liable to the individual for *actual damages 'but in no case . . . less than the sum of $1,000.'* " *Doe*, 124 S.Ct. at 1210, 124 S.Ct. 1204 (emphasis added). Since the DPPA uses almost precisely this language, *see* 18 U.S.C. § 2724(b)(1) (providing for "actual damages, but not less than liquidated damages in the amount of $2,500"),[31] *Doe* suggests rather directly that plaintiffs need not prove actual damages to recover the DPPA's minimum liquidated damages award of $2,500.

b. *Kehoe v. Fidelity Federal*

Unlike *Doe*, which construed a different statute from the one at issue here, *Kehoe v. Fidelity Fed. Bank & Trust*, No. 03-80593, 2004 WL 1659617 (S.D.Fla. June 14, 2004), required another district court to confront precisely the interpretative question that we face here.

---

31. The only material difference is the DPPA's reference to "liquidated damages." As we explained in the text, that phrase's common law provenance also suggests that plaintiffs need not establish actual damages to qualify for the minimum $2,500 award.

Appendix D

After "1) consideration of the Supreme Court's decision in *Doe v. Chao;* 2) textual analysis of the Driver's Privacy Protection Act; 3) application of the rule of the last antecedent; 4) examination of the text of other relevant privacy statutes; and 5) examination of the purpose of the phrase 'liquidated damages' in the DPPA," the *Kehoe* court held that "a plaintiff must prove some actual damages to qualify for a minimum liquidated damages award of $2,500 under the DPPA." *Kehoe*, at *8. For the reasons already stated, we find neither the Florida district court's interpretation of *Doe* nor its discussion of the phrase "liquidated damages" to be persuasive, and we cannot locate any independent "textual analysis" of the DPPA in its opinion. Having not yet discussed the rule of the last antecedent or the text of other privacy statutes, we shall consider those guides in our quest to discern congressional intent.

Kehoe relied heavily on the rule of the last antecedent, "according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 380, 157 L.Ed.2d 333 (2003). Applying this canon of statutory construction to the DPPA, the Florida district court interpreted the qualifying phrase "but not less than liquidated damages in the amount of $2,500" as modifying the noun "actual damages" and therefore concluded that the qualifying phrase "would not extend out as its own remedy to be awarded regardless of actual damages." *Kehoe*, at *6.

Appendix D

The Florida district court should not have applied the rule of the last antecedent to the language of the DPPA. In the past, the Supreme Court has applied that rule to texts that include a series of nouns (or phrases) where the last noun (or phrase) is then modified by a dependent clause. The question frequently arises whether the dependent clause modifies all of the nouns (or phrases) in the series or only the final noun (or phrase), and the rule of the last antecedent presumes that the clause modifies only the final noun (or phrase). *See, e.g., Barnhart* (holding that the phrase "which exists in the national economy" in 42 U.S.C. § 423(d)(2)(A) modifies only "other kind of substantial gainful work" and not "previous work"); *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959) (explaining that the phrase "who is engaged in dealing commercially in fur products or furs" in 15 U.S.C. § 69(f) modifies only "any other person" and not "purchaser, consignee, factor, bailee, correspondent, or agent").

Because § 2724(b)(1) is so different from other statutes to which the Supreme Court has applied the rule of the last antecedent, the rule seems irrelevant to interpreting whether a DPPA plaintiff must prove actual damages to qualify for liquidated damages. First, § 2724(b)(1) contains, at most, only one antecedent ("actual damages") before the qualifying phrase ("but not less than liquidated damages in the amount of $2,500"). While the rule of the last antecedent may assist a judge in deciding whether modifying language applies to one, or all, antecedents, its value is quite limited when there are not multiple antecedents.

More fundamentally, the Florida district court assumed that the clause "but not less than liquidated damages in the amount of $2,500" "qualified" the phrase "actual damages," *see Kehoe*, at *6, but neither the text of the statute nor the rule of the last antecedent (which is by its terms simply inapplicable to § 2724(b)(1)) requires any such assumption. It is far from clear in what sense the *Kehoe* court meant that the reference to liquidated damages "qualified" the availability of actual damages because its holding functionally "qualifies" the availability of liquidated damages on proof of actual damages. From a grammatical standpoint, there is no doubt that the dependent clause "but not less than liquidated damages in the amount of $2,500" "depends" on the independent clause "actual damages," but that grammatical principle does not require the conclusion that the former clause "qualifies" the latter in terms of functional legal effect.

Kehoe also placed great emphasis on how Congress drafted 18 U.S.C. § 2520(2) and 26 U.S.C. § 7431(c) (the "other statutes"), two provisions structured quite differently from § 2724(b)(1). Both of the other statutes allow courts to award actual damages "or" statutorily liquidated damages, but § 2724(b)(1) eschews the disjunctive, explaining simply that courts may award "actual damages, but not less than liquidated damages in the amount of $2,500." Since § 2724(b)(1) does not use the word "or," the Florida district court inferred that Congress did not intend for plaintiffs to recover either actual damages "or" liquidated damages. Liquidated damages, in its view, are available only upon proof of actual damages. *See Kehoe*, at *7.

This approach misconceives the judiciary's role in our constitutional system. While courts certainly remain responsible for interpreting laws, their labors must focus on discovering the legislature's intent in enacting particular statutes. Thus, *Kehoe* should have concentrated on discovering what Congress intended by the words that it chose to enact, not on whether other words—such as those used in the other statutes—might have made that intent more apparent. To be sure, Congress could have been clearer in the DPPA, but our role is to discern legislative intent, even when a statute's text does not readily reveal that intent.

In *Kehoe*, the Florida district court focused on the differences between the DPPA and the other statutes. While other parts of the United States Code sometimes inform statutory construction, courts should look to similarly phrased statutes to aid their interpretative labors. Looking to statutes that use different language, as the *Kehoe* court did, may suggest that a certain statute was inartfully drafted, but it will not shed light on Congress's intent in enacting the statute at issue.

We have discovered five other places in the United States Code where language similar to § 2724(b)(1) appears.[32] Though we have not found reported cases

32. *See* 18 U.S.C. § 2710(c)(2) (2005) ("The court may award . . . actual damages but not less than liquidated damages in an amount of $2,500. . . ."); 47 U.S.C. § 338(i)(7) (2005) ("The court may award . . . actual damages but not less than liquidated damages computed at the rate of $ 100 a day for each day of

(Cont'd)

considering whether four of these five statutes require proof of actual damages as a prerequisite to an award of liquidated damages, at least one district court has construed 47 U.S.C. § 551(f)(2). In *Warner v. American Cablevision of Kansas City*, 699 F.Supp. 851, 858-59 (D.Kan.1988), that court held that "[n]o finding of actual damages or an actual invasion of privacy is required" for a plaintiff to recover under § 551(f)(2). This holding, of course, does not control our construction of the DPPA, but it does illustrate how interpretations of other, *similar* portions of the United States Code may illuminate otherwise murky questions of congressional intent.

To summarize, the *Kehoe* court based its interpretation of the DPPA on "1) consideration of the Supreme Court's decision in *Doe v. Chao;* 2) textual analysis of the Driver's Privacy Protection Act; 3) application of the rule of the last antecedent; 4) examination of the text of other relevant privacy statutes; and 5) examination of the purpose of the phrase 'liquidated damages' in the DPPA." *Kehoe*, at * 8. We do not find *Kehoe* persuasive because it

---

(Cont'd)

violation or $1,000, whichever is higher. . . ."); 47 U.S.C. § 551(f)(2) (2005) ("The court may award . . . actual damages but not less than liquidated damages computed at the rate of $ 100 a day for each day of violation or $1,000, whichever is higher. . . ."); 50 U.S.C. § 1810 (2005) (recognizing that an "aggrieved person" is entitled to recover "actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is greater"); 50 U.S.C. § 1828 (2005) (same).

misinterprets the significance of *Doe* to the DPPA, misapplies the rule of the last antecedent, overlooks other similarly phrased statutes (while inappropriately focusing on differently phrased statutes), and misunderstands the common law pedigree of the phrase "liquidated damages."

c. *Schmidt v. Multimedia Holdings Corp.*

The third case relevant to the remedial issues here is *Schmidt v. Multimedia Holdings Corp.*, 361 F.Supp.2d 1346 (M.D.Fla.2004). "Based on the language of the DPPA, the backdrop of privacy legislation, and the analogous common-law requirements to prove defamation *per quod*,"[33] the court there held that "the DPPA requires some proof of actual, pecuniary loss to qualify for liquidated damages of $2,500." *Id.* at 1356.

Notwithstanding the description of its reasoning just quoted, *Schmidt* appears rooted in a belief that "no legitimate interest would appear to justify a minimum $2,500 recovery for the DPPA's most abstractly defined injury—obtainment—for which the DPPA otherwise provides the incentive (attorneys' fees) and the relief (equitable injunction) for full redress." *Id.* at 1355-56. In other words, since the DPPA clearly provides for attorneys' fees and injunctions even in the absence of actual injury, the *Schmidt* court could not imagine any "legitimate" reason why Congress might have intended

33. Even though it sat in the same state as the *Kehoe* court, the *Schmidt* court apparently found *Kehoe* to be so unpersuasive as to deserve no mention at all.

for violators to pay $2,500 when their violations cause no actual injury. On this point, we may be of some assistance.

While fee shifting may incentivize plaintiffs' attorneys to bring cases against violators, and while injunctions may prevent future misconduct, unless the DPPA provides for statutory damages of $2,500 even in the absence of actual damages, the plaintiffs themselves (*i.e.*, the victims of the invasion of privacy) would receive no compensation for past statutory violations (absent corroboration that they suffered some injury). It would have been "legitimate" for Congress to conclude that such victims deserve compensation, even if the amount of compensation appears to some to be an undeserved windfall.[34] Moreover, Congress "legitimately" could have concluded that, unless it included a significant penalty for even those violations that did not actually cause damage, the DPPA would not sufficiently deter widespread, though minor, invasions of privacy.

We could say more about *Schmidt*, but suffice it for now to say that we do not find it persuasive.

---

34. Assuming that a knowing violation of the DPPA has occurred, the question of whether proof of actual damages is required to qualify for the minimum $2,500 award could be seen as a question of whether the person who violated the DPPA or the victim of the violation is entitled to $2,500. Congress could rationally have decided to protect the victim. Some may call an award a "windfall" in that case, but refusing to make the award can just as easily be seen as a "windfall" to one who knowingly violates the law.

d. *Our Construction of § 2724(b)(1)*

Having reviewed these cases, we must return to our point of departure: does § 2724(b)(1) require a plaintiff to prove actual damages to qualify for the minimum statutory award of $2,500? *Kehoe* and *Schmidt* answer this question in the affirmative, but their reasoning is unpersuasive. Though we are bound by *Doe's* holding, that holding applies only to the Privacy Act and does not extend to the DPPA, a statute that uses materially different language.

Though no case controls our construction of § 2724(b)(1), we cannot overlook the Supreme Court's statement that, if Congress had intended to permit recovery of statutory damages without any showing of actual damages, it "could have accomplished its object simply by providing that the Government would be liable to the individual for *actual damages 'but in no case . . . less than [a specified] sum. . . .'* " *Doe*, 124 S.Ct. at 1210, 124 S.Ct. 1204 (emphasis added). Because this suggested language parallels § 2724(b)(1) almost to the letter, we now hold that a plaintiff may recover liquidated damages of $2,500 under the DPPA even if she fails to prove actual damages.[35] Of course, if a plaintiff proves that she suffered more than $2,500 in actual damages, she may recover an amount sufficient to compensate her for the full extent of the harm she suffered.

---

35. This holding obviates the need for us to examine what kind of proof might be necessary to establish the existence of actual damages.

B. *Class Certification*

Plaintiffs have requested that we certify a nationwide class consisting of:

> All persons who both (1) are or were employees of Cintas, family members or other persons who resided with Cintas employees, and/or persons whose vehicles were operated by Cintas employees, from July 1, 2002 through the present; and (2) had their personal information, as defined by the DPPA, obtained, used and/or disclosed by Defendants and/or their agents, without their consent, for uses not permitted by the DPPA, from July 1, 2002 through the present.

Pls.' Mot. at 1-2. Unfortunately, this proposal suffers from three serious deficiencies. First, it obscures important differences in what the evidence reveals about the actions of UNITE, the Teamsters, and Raynor. Second, it fails to describe a definite number of individuals because the class definition includes a temporal condition ("from July 1, 2002 through the present") without specifying a termination date. Finally, the reference to "uses not permitted by the DPPA" inextricably intertwines identification of class members with liability determinations.[36]

---

36. Essentially, the proposed class would consist of everyone to whom the defendants are liable under the DPPA.

To side-step these difficulties, we shall not evaluate the class that plaintiffs propose, but focus instead on whether to certify three subclasses consisting of:

> (1) All persons whose license plate numbers were used by UNITE, directly or indirectly, individually or jointly, as part of an effort to knowingly obtain, use and/or disclose personal information from motor vehicle records between July 1, 2002 and August 2, 2004 (the "UNITE subclass");
>
> (2) All persons whose license plate numbers were used by the Teamsters, directly or indirectly, individually or jointly, as part of an effort to knowingly obtain, use and/or disclose personal information from motor vehicle records between July 1, 2002 and August 2, 2004 (the "Teamsters subclass"); and
>
> (3) All persons whose license plate numbers were used by Raynor, directly or indirectly, individually or jointly, as part of an effort to knowingly obtain, use and/or disclose personal information from motor vehicle records between July 1, 2002 and August 2, 2004 (the "Raynor subclass").

See Fed.R.Civ.P. 23(c)(4) (authorizing division of class into subclasses and maintenance of class action "with respect to particular issues"). Considering each subclass separately avoids conflating the defendants' conduct.

By including an August 2, 2004[37] cut-off for class membership, the parties (perhaps after additional discovery) will be more certain whether any particular individual is a member of the class. Most importantly, these new subclass definitions will permit the parties (and the courts) to assess whether class certification would be appropriate without delving too deeply into the merits of the subclasses' claims.

To obtain certification of a subclass, plaintiffs must establish all four of the prerequisites to a class action specified in Federal Rule of Civil Procedure 23(a) and satisfy the criteria articulated in at least one part of Rule 23(b). *See Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir.1994). Our Court of Appeals has recognized that, "[i]n reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action." *Newton v. Merrill Lynch, Pierce, Fenner, & Smith*, 259 F.3d 154, 168 (3d Cir.2001). When necessary, therefore, we shall undertake such a preliminary inquiry into the merits to avoid "granting certification [that] may generate unwarranted pressure to settle non-meritorious or marginal claims." *Id.*

---

37. We selected August 2, 2004, the day precisely one month after defendants were served with the complaint, as the cut-off date because record evidence suggests that the defendants stopped their allegedly impermissible practices after learning about this lawsuit and the DPPA. *See* Raynor Dep. at 25; Mestrich Dep. at 116-17.

Appendix D

1. *Rule 23(a)*

Before deciding whether plaintiffs meet any of the Rule 23(b) criteria, we must consider whether they can establish the prerequisites listed in Rule 23(a). *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 624 (3d Cir.1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The four prerequisites to a class action are:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). As a shorthand, courts regularly refer to the prerequisites as numerosity, commonality, typicality, and adequacy of representation. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527 (3d Cir.2004); *Georgine*, 83 F.3d at 624. These requirements "are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances." *Baby Neal*, 43 F.3d at 55.

Appendix D

a. *Numerosity*

The first prerequisite of any class action is that the class must be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). UNITE and Raynor "do not challenge . . . that . . . plaintiffs have satisfied the numerosity requirement." UNITE Mem. at 21; *see also* Rosen Decl. Ex. 4, ¶ 3. In view of this concession, we find that plaintiffs have established numerosity with respect to the UNITE and Raynor subclasses.

Although the Teamsters stipulated that "the number of Cintas persons[38] contacted at their homes by [Teamsters] representatives . . . satisfies the numerosity requirements of Rule 23," Rosen Decl. Ex. 4, ¶ 4 (footnote added), they now argue that plaintiffs have failed to prove numerosity because "not all Cintas persons contacted by [the Teamsters] are class members," Teamsters Mem. at 19. In other words, it appears that the Teamsters admit contacting many Cintas persons without conceding that they obtained those persons' addresses, directly or indirectly, from motor vehicle records. Plaintiffs ask us to reject this "attempt to weasel out of the effect of [the] stipulation," but they fail to explain any flaw in the Teamsters's reasoning. Pls.' Reply at 4 n. 2.

The plain language of the stipulation recognizes only that the Teamsters contacted a large number of "Cintas

38. The stipulation defines "Cintas persons" as "individuals directly or indirectly related to Cintas." *See* Rosen Decl. Ex. 4, ¶ 3.

persons" and does not even mention motor vehicle records. Only one paragraph prior to the Teamsters's limited stipulation, UNITE recognized that the number of Cintas persons "whose name and address [it] learned . . . *through Motor Vehicle records* satisfies the numerosity requirements of Rule 23." Rosen Decl. Ex. 4, ¶ 3 (emphasis added). Plaintiffs did not insist upon any similar language in their stipulation with the Teamsters. Since they have neither a sufficiently precise stipulation nor other evidence relevant to the issue, we find that plaintiffs have failed to establish numerosity with respect to the Teamsters subclass.

b. ***Commonality***

The second prerequisite to class certification is that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). The commonality threshold is relatively low because the named plaintiffs need only "share at least one question of fact or law with the grievances of the prospective class." *Baby Neal*, 43 F.3d at 56. "A finding of commonality does not require that all class members share identical claims, and indeed factual differences among the claims of the putative class members do not defeat certification." *In re Prudential Ins. Co. Sales Litig.*, 148 F.3d 283, 310 (3d Cir.1998) (quotations omitted).

Here, UNITE organizers collected license plate numbers from the Emmaus plant and used them to obtain names and addresses of potential Cintas employees. There is also evidence that UNITE engaged

in similar conduct in eight other states. This pattern of activity raises common issues of fact and suggests that UNITE may have had a common purpose (or a common combination of purposes) in attempting to obtain names and addresses from license plates in so many locations. Indeed, UNITE explains that it needed to obtain names and addresses of Cintas employees to inform them about their opportunity to join the *Veliz* class. To the extent that the parties dispute whether the DPPA permits the use of motor vehicle records for such a purpose, *see* 18 U.S.C. § 2721(b)(4) (2005), a common question of law exists.

The Teamsters deny obtaining, disclosing, or using personal information from motor vehicles, but plaintiffs seem to believe that the Teamsters must have at least used information that UNITE obtained illegally. Regardless of which side is correct, the Teamsters subclass would raise common questions. If UNITE shared names and addresses with the Teamsters, a common factual issue would arise as to whether the Teamsters knew that UNITE obtained the information from motor vehicle records. Even if the Teamsters never received a single name or address from UNITE, the Teamsters could assert that common defense.

Similarly, Raynor appears not to have had any knowledge that UNITE was accessing motor vehicle records, so he may assert a common defense to the claims of all of the plaintiffs.

In short, we find that plaintiffs have demonstrated that commonality exists with respect to the UNITE, Teamsters, and Raynor subclasses.

c. *Typicality*

In addition to numerosity and commonality, plaintiffs must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). "The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Barnes v. American Tobacco Co.*, 161 F.3d 127, 141 (3d Cir.1998). Thus, we must determine whether "the named plaintiff[s'] individual circumstances are markedly different or the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir.1985) (quotations and alterations omitted). Because typicality "acts as a bar to class certification only when the legal theories of the named representatives potentially conflict with those of the absentees," *Newton v. Merrill Lynch, Pierce, Fenner, & Smith*, 259 F.3d 154, 183 (3d Cir.2001) (quotations omitted), "even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Baby Neal*, 43 F.3d at 58.

Appendix D

The UNITE subclass consists of all persons whose license plate numbers were used by UNITE, directly or indirectly, individually or jointly, as part of an effort to knowingly obtain, use and/or disclose personal information from motor vehicle records between July 1, 2002 and August 2, 2004. There is no dispute that the remaining nine plaintiffs belong to this subclass, *see* Naccaranto Dep. Ex. 2; Naccaranto Dep. Ex. 4, at 126, and they seek to recover under the same legal theory as the subclass as a whole—that UNITE violated the DPPA when it obtained their personal information from motor vehicle records. We find, therefore, that plaintiffs have established typicality with respect to the UNITE subclass.

There is no evidence, however, that any of the plaintiffs would be a member of the Raynor subclass or the Teamsters subclass. UNITE's site coordinators decided for themselves whether to access motor vehicle records, and their president, Raynor, had no involvement, direct or indirect, in obtaining, disclosing, or using personal information about the Emmaus employees (or any other employees) from motor vehicle records. *See* Raynor Dep. at 31-33. Thus, all of the plaintiffs have failed to establish that they would be members of the Raynor subclass. Since we cannot say that they would be members of the subclass, we cannot find that their claims would be typical of other individuals who might be members of the Raynor subclass.

Appendix D

Although the Teamsters and UNITE may have divided responsibility for contacting potential Cintas employees between themselves, the claims in this case arise out of knowingly obtaining, disclosing, and/or using their personal information from motor vehicle records, not out of contacting them *per se*. There is no evidence that the Teamsters and UNITE coordinated their efforts to obtain the names and addresses of potential employees at the Emmaus plant. As we already summarized, UNITE obtained this information primarily from motor vehicle records, but the Teamsters obtained names from a list of *Veliz* plaintiffs and addresses from internet databases. The Teamsters neither requested names and addresses from UNITE nor received names and addresses that they knew UNITE had obtained from motor vehicle records. *See* Kane Dep. at 145, 203-04.[39] UNITE never told the

---

39. DeMay testified that UNITE provided some addresses to the Teamsters, *see* DeMay Dep. at 86-87, 98-99, but it appears that his testimony on that subject referred to the joint UNITE-Teamsters organizing effort in Illinois, where he was a site coordinator. Address-sharing in Illinois does not suggest that address-sharing also occurred in Pennsylvania because the unions coordinated about such subjects at the local level. Thus, we do not consider DeMay's testimony to be evidence that the Teamsters invaded the named plaintiffs' DPPA-protected privacy interests.

Further, even if UNITE provided to the Teamsters Pennsylvania addresses that it obtained from motor vehicle records, there is no evidence that the Teamsters *knew* that UNITE had obtained the addresses from motor vehicle records.

(Cont'd)

Teamsters that it obtained names and addresses from motor vehicle records, though Kane assumed that UNITE may have obtained some of them from "cars." Kane Dep. at 46, 48, 111-12[40]; Mestrich Dep. at 192-93, 201. In the absence of any evidence that the Teamsters knowingly obtained, disclosed, or used the named plaintiffs' personal information from motor vehicle records, we cannot find that the named plaintiffs' claims are typical of the claims of the Teamsters subclass as a whole.

(Cont'd)

In this regard, we note that the Teamsters maintain a housecall form that includes Quinn's name and address. *See* Pls.' Deps. Ex. 5. The UNITE organizers who visited Quinn gave his name and address to Kane because they believed that Quinn "looked like a driver." Pls. Deps. Ex. 11 at 466; *see also* Kane Dep. at 148-151. Kane did not know that UNITE obtained Quinn's name and address from motor vehicle records. Kane Dep. at 153-54. Since there is no evidence suggesting that the Teamsters knew that Quinn's name and address came from motor vehicle records, Quinn is not a typical member of the Teamsters subclass.

40. Plaintiffs believe that "Kane admitted that he learned of [UNITE's] practice [of recording license plate numbers] *prior* to the filing of this lawsuit." Pls.' Reply at 8 (citing Kane Dep. at 113). When read in context, however, the meaning of Kane's testimony is far from clear. *See* Kane Dep. at 112 (answering "No" to the question "Prior to the institution of the lawsuit, did you learn they were doing that [(*i.e.*, UNITE was recording license plate numbers)]?"). Taking his testimony as a whole, we find that Kane did not admit knowing, before this lawsuit was filed, that UNITE had recorded license plate numbers.

d. *Adequacy*

The final prerequisite to class certification is that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). "Adequacy of representation assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." *Baby Neal*, 43 F.3d at 55. To assess this factor, our Court of Appeals has explained that we should inquire into whether (1) counsel is qualified to represent that entire class; and (2) the named plaintiffs have conflicts of interest with other members of the proposed class. *See Georgine*, 83 F.3d at 630. Since defendants do not contest that Spector Gadon is as qualified to represent the class as any firm whose fees are advanced by Cintas could be, *see also* Rosen Decl. ¶¶ 8-10 (summarizing Spector Gadon's qualifications to represent the subclasses),[41] we may focus on potential conflicts of interest between the named plaintiffs and other members of the subclasses.

Defendants contend that the named plaintiffs cannot adequately represent the absent class members because Cintas could pressure the named plaintiffs to pursue or

---

41. We would be remiss not to acknowledge that Spector Gadon exhibited commendable, and all too rare, candor in bringing to our attention *Schmidt v. Multimedia Holdings Corp.*, a decision adverse to its clients' interests. *See* Pls.' Reply at 10 n. 9. This ethical demonstration confirms that Spector Gadon is well-qualified to represent the absent class members.

discontinue this litigation to serve the company's ends, regardless of the effect on the class. See UNITE Mem. at 29-33.[42] According to defendants, Cintas has the ability to exert this influence because it employs the plaintiffs (or their friends or family members) and because it advances the costs of this litigation as well as Spector Gadon's fees.

---

42. In a related argument, the defendants submit that we should not certify a class because § 101(a)(4) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(4) (2005), prohibits "interested employers" from "directly or indirectly financ[ing], encourag [ing], or participat[ing] in, except as a party," any action brought by a "member" of a labor organization. *See* UNITE Mem. at 33-35. Section 101(a)(4) does not appear to apply to this case because the named plaintiffs are not "member[s]" of any labor organization. If a class is certified, and if some members of that class are union "members," Cintas may have to discontinue its support of this litigation to comply with the LMRDA.

Even if section 101(a)(4) applied to this case, defendants have cited no authority for the proposition that a court should decline to certify a class seeking to vindicate its statutory rights because a third party has violated a different statute. Nor have they cited any authority for the proposition that Cintas's alleged violation of the LMRDA, if proven, would constitute a "substantive defense to this litigation." *See* UNITE Mem. at 33 n. 9. While defendants might pursue an independent LMRDA claim against Cintas, 29 U.S.C. § 412; *see, e.g.*, *Auto Workers v. Nat'l Right to Work Legal Defense & Educ. Found.*, 590 F.2d 1139 (D.C.Cir.1978) (exemplifying a union's suit to enforce section 101(a)(4)), we are unaware of any case holding that section 101(a)(4) creates an affirmative defense in the action that the employer finances, encourages, or participates in.

If we were to certify one or more of the subclasses, however, whatever leverage Cintas may have over the named plaintiffs would not permit it to control the conduct of this case because Spector Gadon would owe a duty of loyalty not only to the named plaintiffs but to all class members. Thus, Spector Gadon would have to decline to follow even the named plaintiffs' explicit instructions to settle the case if it concluded that acting on those orders would not be in the absent class members' best interests.

Though Cintas now advances its fees, Spector Gadon has robust incentives to maximize the class's total recovery because it will receive a reasonable percentage of that recovery. In view of this potential for a sizeable fee award, it seems especially unlikely that Spector Gadon would breach its duty of loyalty by settling this case too cheaply. *See also Vanderbilt v. Geo-Energy Ltd.*, 725 F.2d 204, 210 (3d Cir.1983) (rejecting suggestion that "there is something inherently perfidious in an arrangement whereby a litigant's counsel fees and litigation expenses are financed by someone other than the litigant"). Assuming *arguendo* that Spector Gadon did violate its fiduciary duties to the absent class members, no settlement could take effect without our approval, and we will continue to protect absent class members, especially now that defendants have alerted us to the potential, however remote, that Cintas could influence this litigation.

Even if Cintas somehow retained the power to manipulate this case, we doubt that it would exercise

that power to disadvantage the absent class members. First, Cintas agreed not to "interfere" with Spector Gadon's relationship with the named plaintiffs or the "independence of [its] professional judgment, particularly with regard to the handling of this matter in the best interests of the plaintiffs." Rosen Decl. Ex 12, at 2. Moreover, the entire record suggests that Cintas remains unwaiveringly committed to maintaining a union-free workplace and the unions remain equally dedicated to organizing Cintas's employees. Given these entrenched positions, Cintas is most likely to exert whatever influence it has to inflict the maximum possible damage on the unions. Cintas's interest in crippling the unions thus aligns perfectly with the class's interest in a large recovery.

In addition to the supposed potential for conflict between Cintas and the class, defendants also argue that a conflict of interest exists between the relatively anti-union named plaintiffs and the many pro-union Cintas employees who would be members of the subclasses. *See* UNITE Mem. at 35-40. Apparently innocent of any sense of irony, this argument suggests that the named plaintiffs will pursue this case too vigorously while defendants had earlier claimed that the named plaintiffs would be too willing to surrender if Cintas requested it.

Putting aside the inconsistency in these positions, we note again that the short-run financial interests of the named plaintiffs and the pro-union Cintas employees are identical: both groups would benefit from a damage

award here.[43] To the extent that any "conflict" exists, it centers around their attitude toward unionization. This lawsuit, however, is not a referendum on the desirability of unionization; it is an inquiry into whether a particular organizing tactic violates the DPPA. While some pro-union ideologues may believe that the unions should be permitted to employ any organizing tactic that they find useful, other pro-union employees may prefer that the unions cease using some tactics, including the use of motor vehicle records to obtain names and addresses. Further, while some employees may prefer unionization to non-unionization, we suspect that even pro-union employees would prefer unionization plus $2,500 in damages to either unionization alone or to non-unionization.[44]

We do not pretend to have canvassed the entire field of possible sentiments among Cintas employees, but the foregoing discussion illustrates the potential problems with defendants' assumption (which lacks any evidentiary support) that all pro-union employees have a conflict of interest with the named plaintiffs.[45] More

---

43. Although the unions did not make this point in their briefs, we recognize that they probably believe that the long-term financial benefits of union membership exceed the value of any monetary recovery the class may receive in this case.

44. There is no evidence that the unions would stop their organizing campaign against Cintas even if they lost this case.

45. Indeed, there is no evidence in the record suggesting how many of Cintas's employees favor unionization, much less how many of the pro-union employees oppose this litigation.

fundamentally, even if we accepted defendants' invitation to presume that a large number of absent class members would oppose continuing this litigation, we could still find that plaintiffs have established adequacy because Rule 23 requires only that the named plaintiffs "fairly and adequately *protect* the interests of the class." Fed.R.Civ.P. 23(a)(4) (emphasis added). The named plaintiffs are clearly attempting to protect the class's DPPA-created privacy interests, and the (theoretical) existence of a group of class members that would prefer to sacrifice those interests does not suggest that the named plaintiffs are in any way inadequate representatives.

Because there are no conflicts of interest that would prevent the named plaintiffs from fairly and adequately representing the absent class members, we hold that the plaintiffs have satisfied the requirements of Rule 23(a)(4) with respect to the UNITE, Teamsters, and Raynor subclasses.

e. *Summary of Prerequisites*

We have held that the named plaintiffs failed to demonstrate that the members of the Teamsters subclass are so numerous that joinder of all members is impracticable. The named plaintiffs also have not shown that their claims are typical of the claims of the absent members of the Teamsters and/or Raynor subclasses. Since plaintiffs have not established all four of the prerequisites with respect to them, we shall not certify either the Teamsters subclass or the Raynor subclass.

Still, plaintiffs have established numerosity, commonality, typicality, and adequacy with respect to the UNITE subclass, so we may certify that subclass if they can also satisfy the criteria articulated in at least one of the parts of Rule 23(b).[46]

2. *Rule 23(b)*

Once a group of plaintiffs has satisfied the requirements of Rule 23(a), it cannot obtain class certification without showing that:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be

---

46. Because only one of the three subclasses satisfies the prerequisites for certification, we may certify, at most, one subclass. With the possibility of certifying only one "subclass," however, referring to "subclasses" becomes awkward. Thus, we shall refer to the UNITE subclass simply as "the class" for the remainder of this Memorandum.

> dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed.R.Civ.P. 23(b). Eschewing only the possibility of certification pursuant to Rule 23(b)(1)(B), plaintiffs submit that we could certify the class under Rule 23(b)(1)(A), (b)(2), or (b)(3). *See* Pls.' Mem. at 30-39. We shall consider separately each alternative.

a. *Rule 23(b)(1)(A)*

Rule 23(b)(1)(A) permits class certification where "the prosecution of separate actions by or against individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect

to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Were we not to certify the class, at least a few of the scores of individuals who have expressed interest in joining this lawsuit probably would file suits of their own around the country. *See* Friedman Decl. ¶ 3. The DPPA is a relatively young statute, and this case presents the first opportunity for a federal court to consider its application to a union organizing campaign. While we are confident that we have construed it correctly, there is a "risk" that another court could interpret the DPPA differently (as we interpret it differently from the *Kehoe* and *Schmidt* courts). If that were to occur, the inconsistent adjudications would establish incompatible standards of conduct for UNITE. Thus, we could certify the class pursuant to Rule 23(b)(1)(A).

b. *Rule 23(b)(2)*

We may certify a class under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

UNITE acted "on grounds generally applicable" to the class. The class includes all persons whose motor vehicle records UNITE knowingly obtained, disclosed, or used as part of the organizing campaign, and the record does not suggest any material differences in the

members' circumstances. As part of the campaign, UNITE wanted to make contact with as many Cintas employees as possible. To that end, it employed the time-tested tactic of using license plate numbers to obtain names and addresses from motor vehicle records. There may have been minor state-to-state variations in who decided to access motor vehicle records or in how UNITE obtained drivers' personal information, but the record clearly demonstrates that "UNITE obtained from Motor Vehicle records the name and address information of persons presumed to be employed by Cintas Corporation" in nine states. Rosen Decl. Ex. 2, at 5. Although UNITE had multiple purposes for contacting employees—to investigate working conditions, to gauge interest in unionization, and to recruit new members of the *Veliz* class, *see* Mestrich Dep. at 199; DeMay Dep. at 51, 89—it attempted to make contact with employees for all of these purposes. Because UNITE acted similarly and for similar purposes with respect to all class members, we find that UNITE acted "on grounds generally applicable" to the class.

Nevertheless, defendants submit that we may not certify a (b)(2) class in this case because plaintiffs seek substantial liquidated damages and "certification under Rule 23(b)(2) is proper only where the primary relief sought is injunctive." Teamsters Mem. at 20. Our Court of Appeals has stated that "[s]ubsection (b)(2) class actions are limited to those class actions seeking *primarily* injunctive or corresponding declaratory relief." *Barnes v. American Tobacco Co.*, 161 F.3d 127, 142 (3d Cir.1998) (quotations omitted and emphasis

added). Moreover, Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or *predominately* to money damages." Fed.R.Civ.P. 23 advisory committee's note (emphasis added). We read *Barnes's* reference to classes seeking "primarily" equitable relief as describing precisely those classes that do not seek "predominately" money damages. In other words, the Court of Appeals's notion of "primacy" is coextensive with the Advisory Committee's understanding of "predominance."

In this case, plaintiffs seek statutory and punitive damages as well as injunctive and declaratory relief, *see* Am. Compl. at 14, raising a question as to whether they seek "predominately" (or "primarily") legal or equitable relief. Since no precedential opinion of our Court of Appeals has addressed this issue in any detail, we look to other circuits for guidance. *But see In re School Asbestos Litig.*, 789 F.2d 996, 1008 (3d Cir.1986) (affirming district court's refusal to certify a (b)(2) class where plaintiffs' claims were "essentially for damages"); *Barabin v. Aramark Corp.*, No. 02-8057, 2003 WL 355417, at *1-2 (3d Cir. Jan. 24, 2003) (discussing the issue in unpublished decision).

In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir.1998), the Fifth Circuit became the first federal appellate court to articulate principles for when monetary relief "predominates" so as to preclude certification of a (b)(2) class. After explaining that the predomination requirement "protects the legitimate interests of potential class members who might wish to

pursue their monetary claims individually . . . and . . . preserves the legal system's interest in judicial economy," the court held that "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." *Id.* at 415. This approach essentially presumes that a class seeking monetary relief cannot be certified under Rule 23(b)(2), but it permits plaintiffs to rebut that presumption if they can show that their requested money damages are only "incidental" to the equitable relief they seek.

Further describing how to rebut the presumption against certifying a (b)(2) class that seeks money damages, the Fifth Circuit continued:

> By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief. Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established. That is, the recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental

> damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

Id. at 415 (citations omitted). The Eleventh and Seventh Circuits have followed the Fifth Circuit's "bright-line" approach. *See Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir.2001); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898-99 (7th Cir.1999).

The Second Circuit, however, noted that the bright-line approach "forecloses (b)(2) class certification of all claims that include compensatory damages (or punitive damages) even if the class-wide injunctive relief is the form of relief in which the plaintiffs are primarily interested." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 163 (2d Cir.2001) (quotations omitted). Moreover, the Fifth Circuit's approach ignored "the fact that Rule 23 has historically been understood to vest district courts with the authority to deter mine whether, in their informed discretion, based on the particulars of the case, the certification prerequisites have been satisfied." *Id.* at 164 (quotations omitted). For these reasons, the Second Circuit declined to adopt the bright-line approach, holding instead that:

> [W]hen presented with a motion for (b)(2) class certification of a claim seeking both injunctive relief and non-incidental monetary damages, a district court must consider the evidence presented at a class certification hearing and the arguments of counsel, and then assess whether (b)(2) certification is appropriate in light of the relative importance of the remedies sought, given all of the facts and circumstances of the case. The district court may allow (b)(2) certification if it finds in its informed, sound judicial discretion that (1) the positive weight or value to the plaintiffs of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed, and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.

Id. (quotations, alterations, and citations omitted). Though this "ad hoc" approach complicates the analysis when a class seeks "non-incidental monetary damages," it recognizes that a class seeking incidental damages may be certified under Rule 23(b)(2). *See id.* at 165 ("This presumption of cohesion and unity continues where incidental damages are . . . sought because entitlement to such damages does not vary based on subjective considerations of each class member's claim . . . ."). Moreover, the Second Circuit approved of *Allison*'s definition of "incidental damages." *See id.* at 164. The Ninth Circuit has joined the Second Circuit in

rejecting the bright-line approach in favor of an ad hoc approach. *See Molski v. Gleich*, 318 F.3d 937, 949-950 (9th Cir.2003).[47]

Our Court of Appeals has not explicitly considered whether to adopt the bright-line approach or the ad hoc approach toward certifying a (b)(2) class that seeks non-incidental damages. Still, one of its unpublished decisions explains that, "where parties seek monetary relief, a court may only certify a [(b)(2)] class if the damages claim is incidental to the primary claim for injunctive or declaratory relief." *Barabin*, 2003 WL 355417, at *1. Essentially restating (albeit in shorthand) the bright-line approach, this statement suggests that the Court of Appeals will join the Fifth, Seventh, and Eleventh Circuits when an appropriate case reaches it.

Returning now to the case before us, the named plaintiffs seek liquidated damages[48] and punitive

---

47. The Sixth Circuit has noted the division of opinion among the circuits, but it has not taken a position on the proper approach. *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 574 (6th Cir.2004).

48. Technically, they request "monetary damages . . . in an amount not less than the statutory-provided liquidated damages of $2,500." Am. Compl. at 14, ¶ 1. Though this phrasing leaves open the possibility that some class members could receive more than $2,500 if they could prove that their actual damages exceeded that amount, we could not certify *any* class if plaintiffs pressed their entitlement to individualized damages determinations. In addition, the evidence suggests that no class

(Cont'd)

damages in addition to equitable remedies. *See* Am. Compl. at 14. If they prove that UNITE is liable, the class members "automatically would be entitled" to liquidated damages that would be "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Allison*, 151 F.3d at 415. Similarly, the class as a whole seeks punitive damages because it believes that UNITE engaged in a pattern of willfully and/or recklessly disregarding the DPPA. *See* 18 U.S.C. § 2724(b)(2) (2005). Since UNITE directed this pattern at the class as a whole, any punitive damage award would not depend on "complex individualized determinations" or "require additional hearings to resolve the disparate merits of each individual's case." *Allison*, 151 F.3d at 415. The statutory and punitive damages that the class seeks are "more in the nature of a group remedy," so we find that they are "incidental" to the requested equitable relief. As the class seeks only incidental damages, its request for damages does not preclude certification under Rule 23(b)(2). We need not choose between the bright-line approach and the ad hoc approach because the result would be the same under either of them.

(Cont'd)

member actually suffered more than $2,500 in damages. We therefore presume that plaintiffs now seek only statutory damages of $2,500 each, regardless of what they may have sought in the amended complaint. If plaintiffs intend to press their right to recover more than $2,500 in actual damages, they should notify us within ten days so that UNITE may file a motion to reconsider our certification decision.

Though UNITE acted on grounds generally applicable to the class and we may certify a (b)(2) class that requests incidental damages, we must also assure ourselves that final injunctive relief would be "appropriate." In this circuit, courts analyze the propriety of injunctive relief under the rubric of "cohesiveness." *See Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 248 (3d Cir.1975) (explaining that a(b)(2) "class must be cohesive as to those claims tried in the class action"). "Indeed, a (b)(2) class may require more cohesiveness than a (b)(3) class . . . because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out." *Barnes*, 161 F.3d at 142-43.

As we have already discussed, defendants point out that at least some Cintas employees support UNITE's organizing campaign and want it to continue. *See generally* Kennedy Decl. Exs. EE to OO. Far from hoping to stop UNITE from using information that it obtained through their motor vehicle records, these pro-union employees want UNITE to keep in contact with them. A (b)(2) class, however, would seek an injunction forbidding UNITE from contacting all class members, including pro-union members. *See* Am. Compl. at 14, ¶ 5. Though pro-union members might prefer to be exempt from such an injunction, Rule 23 does not provide them with an opportunity to opt out of a (b)(2) class. We find, therefore, that existence of pro-union and anti-union factions within the class renders it

insufficiently cohesive to qualify for certification under Rule 23(b)(2).[49]

c. *Rule 23(b)(3)*

If we find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," we may certify the class under Rule 23(b)(3). As shorthand, courts frequently refer to these twin requirements as predominance and superiority. *See, e.g., Prudential*, 148 F.3d at 313.

i. *Predominance*

"The Rule 23(b)(3) predominance inquiry tests whether the class is sufficiently cohesive to warrant

---

49. Our finding that the class lacks the cohesiveness that Rule 23(b)(2) requires is not inconsistent with our earlier finding that the named plaintiffs can adequately represent the class's interests even though some class members support the union. While the inquiry into cohesiveness focuses on whether the class members share common goals, the adequacy analysis requires only consideration of whether the named plaintiffs suffered the same kind of legally recognized injury as the absent class members. Here, the named plaintiffs are adequate representatives of the pro-union employees, within the meaning of Rule 23(a)(4), because UNITE violated both groups' DPPA privacy rights. Since the pro-union employees may not want to remedy that violation, however, we believe that the class is not cohesive enough to require them to participate.

adjudication by representation, and mandates that it is far more demanding than the Rule 23(a)(2) commonality requirement." *In re LifeUSA Holding Inc.*, 242 F.3d 136, 144 (3d Cir.2001). To satisfy the test, "the common issues must constitute a 'significant part' of the individual cases." *Chiang v. Veneman*, 385 F.3d 256, 273 (3d Cir.2004).

We have no difficulty finding that common issues predominate over individual issues in this case. UNITE admits it has obtained personal information about the class members from motor vehicle records and has not argued that it had different reasons for getting each class member's information. There may have been several reasons why UNITE wanted to make contact with each Cintas employee, but the same set of reasons applied to all of the class members. While some class members may have received phone calls and others home visits, these differences are immaterial because UNITE would have violated the DPPA if it obtained personal information from motor vehicle records for an impermissible purpose, regardless of how it later actually used the information. Similarly, it would not matter whether UNITE used a single intermediary to obtain the personal information from motor vehicle records or if it used different agents in different parts of the country to obtain it because the only material issue concerns whether, not how, it was obtained. Because UNITE's liability would not depend upon which organizer decided to access motor vehicle records (or that organizer's knowledge of the DPPA), the fact that its site coordinators each decided independently how to

obtain employees' names and addresses, without any centralized direction or coordination, does not suggest that individual issues predominate over common ones.

Significantly, defendants cannot point to a single issue that requires separate determination for each class member. The Teamsters might have claimed that each class member would have had to make "an individual showing of 'knowledge' " had we certified the Teamsters subclass, *see* Teamsters Mem. at 10-11, but we need not resolve that issue because plaintiffs failed to establish numerosity and typicality with respect to that subclass. UNITE cannot make a similar argument because it admits to obtaining names and addresses from motor vehicle records in nine states and does not deny "knowing" that it did so.[50]

While defendants contend that the DPPA requires determination of each class members' damages individually, this argument rests on the faulty premise that plaintiffs are not entitled to liquidated damages of $2,500 without proof of actual damages. As we already held, however, plaintiffs may recover liquidated damages even if they fail to show that they suffered any actual damage. The DPPA fixes the amount of damages, so individualized determinations will be unnecessary.

---

50. To the extent that UNITE adopts the Teamsters's claim that one cannot be liable for violating the DPPA without knowing the purpose for which personal information was obtained to be impermissible, *see* Teamsters Mem. at 10 n. 15, we have already rejected that construction of the statute.

In short, we find that questions of law and fact common to the class members predominate over any questions affecting only individual members.[51]

ii. *Superiority*

"The superiority requirement 'asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.' " *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533-34 (3d Cir.2004) (quoting *Prudential*, 148 F.3d at 316). In considering whether a class action is the fairest and most efficient method of adjudication, we should consider, among other matters:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

---

51. Our finding that common issues predominate over individual issues is not inconsistent with our earlier finding that the class was insufficiently cohesive to be certified under Rule 23(b)(2) because "a (b)(2) class may require more cohesiveness than a (b)(3) class." *Barnes*, 161 F.3d at 142.

The first matter weighs neither in favor nor against class certification because the class members do not appear to have any particular interest in individually controlling the prosecution of separate actions. Although there is no similar litigation pending, scores of individuals could file similar suits if we do not incorporate their claims into a class action. *See* Friedman Decl. ¶ 3. It would conserve judicial resources to head off separate litigation by concentrating all of these claims into a class action, and we perceive no particular advantages or disadvantages to concentrating them in this forum. Finally, the claims in this case are relatively straightforward and do not involve any significant individual issues, so we do not expect to encounter great difficulties in managing a class action.

Nevertheless, defendants argue that " 'a class action is not superior where it would result in relatively small recoveries for individual class members while either exposing defendants to large administrative costs or consuming judicial resources, on top of the necessary abundance of court time for supervision.' " Teamsters Mem. at 18 (quoting *Kline v. Security Guards, Inc.*, 196 F.R.D. 261, 274 (E.D.Pa.2000) (Van Antwerpen, J.),[52] *vacated*, 386 F.3d 246 (3d Cir.2004)); *see also Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 405 (E.D.Pa.1995) (Giles, J.) ("A class action would be inconsistent with

52. Defendants take this quotation from the district court's opinion in *Kline* out of context. The court was merely "not[ing] the finding of some courts" without expressing an opinion on whether those cases were rightly decided. *See Kline*, 196 F.R.D. at 274.

the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements."); *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y.1972) (finding that class action was not superior method of adjudicating claims when "the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act").

In essence, defendants contend that the sheer size of their potential liability ought to preclude class certification.[53] Without expressing any opinion on that general principle, we cannot yet apply it to this case because we do not know how many people are members of the class. Though UNITE concedes that it accessed motor vehicle records in nine states, we do not know how many records were accessed. The record shows only that UNITE accessed records related to about seventy vehicles parked at the Emmaus lot. *See* Rosen Decl. Ex. 26. If UNITE accessed about 100 records in each of the nine states, its exposure would be $2.25 million, a sizeable sum to be sure, but not so large a figure that we are now prepared to hold that such *potential* exposure precludes class certification. *See Parker v. Time*

---

53. Cintas employs about 28,000 people, and the DPPA provides for liquidated damages of $2,500 per violation. Multiplying these figures suggests that UNITE may face liability of up to $70 million (excluding punitive damages) if a class is certified.

Warner Entm't Co., 331 F.3d 12, 21-22 (2d Cir.2003) (expressing concern, but declining to hold, that the possibility that defendant could face liability of $12 *billion* could preclude class certification). Should discovery reveal that UNITE's worst fears are realized, we can revisit the issue at that time. *See* Fed.R.Civ.P. 23(c)(1)(C) ("An order [certifying a class action] may be altered or amended before final judgment.").[54]

With so many potential plaintiffs clamoring to join in, a class action will be a far more efficient mechanism to adjudicate the class members' claims than dozens of copy-cat suits pending across the country. The record does not yet suggest that certifying a (b)(3) class, which includes the right to opt-out, would be unfair to anyone, so we find that plaintiffs have met their burden of showing that a class action is superior to other methods for the fair and efficient adjudication of this case.

Since common issues predominate over individual issues and a class action is superior to other adjudicatory mechanisms, we could certify the class under Rule 23(b)(3).

3. *Certification Decision*

For the reasons explained above, we could certify the class under Rule 23(b)(1)(A) or (b)(3). Although the choice between these certifications has profound

54. Even if plaintiffs demonstrate that UNITE violated the DPPA, we "may" decline to award liquidated damages. *See* 18 U.S.C. § 2724(b) (2005).

implications for absent class members' rights to notice and to demand exclusion from the class, *see* Fed.R.Civ.P. 23(c)(2) (requiring notice and the right to opt out only in (b)(3) class actions), the parties have not cited any authority that could inform our selection.

Other courts confronted with this decision have recognized some tension in permitting class members to opt-out and pursue individual actions, as Rule 23(b)(3) does, if separate actions would subject the defendant to the risk of "inconsistent or varying adjudications," as must be the case for the class to be eligible for certification under Rule 23(b)(1)(A). *See Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1351-53 (11th Cir.2001); *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir.1995); *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir.1989); *First Federal v. Barrow*, 878 F.2d 912, 919-920 (6th Cir.1989); *Reynolds v. Nat'l Football League*, 584 F.2d 280, 284 (8th Cir.1978); *Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682, 685 (2d Cir.1977); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir.1976); *see also Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 (3d Cir.1990) (recognizing similar preference for (b)(2) classes over (b)(3) classes). In other words, if a court has already held that separate actions could put the defendant in an impossible situation, then the court ought not permit the prosecution of separate actions by affording absent class members the right to opt out.

This reasoning has considerable force in the ordinary case, where class members choose to opt out because they hope to obtain a larger recovery in a

separate action. This case, however, is far from ordinary. First, it is unlikely that the possibility of a richer damages award would inspire any class member to opt out because all class members would be entitled to the same $2,500 recovery in a separate action as they are entitled to in a class action.

Though the tug of fortune probably would not induce any members to opt out, defendants suggest that a deep-seated commitment to the union might encourage opt outs. They contend that some pro-union Cintas employees would prefer to forfeit their claims against UNITE. These individuals might opt out not to pursue separate actions, but to avoid participating in *any* action. Since providing those pro-union employees an opportunity to opt out of this case would not increase the risk of subjecting UNITE to inconsistent adjudications (because the opt outs will not file individual actions), we see no reason to prefer (b)(1) certification to (b)(3) certification. To the contrary, (b)(3) certification actually reduces UNITE's potential liability without substantially prejudicing the class.

Unfortunately, (b)(3) certification is not costless. All class members must receive notice of the action and of their right to opt out, and providing this notice can be expensive. In the first instance, Cintas (or Spector Gadon) will bear the burden of this expense, but UNITE may ultimately have to pay it. *See* 18 U.S.C. § 2724(b)(3) (2005). Thus, UNITE will reap the benefits of (b)(3) certification (in the form of potentially reduced liability if fervently pro-union employees opt out), but it could

also shoulder the attendant costs if it does not prevail.[55] Because we believe that UNITE is in the best position to serve as a proxy for pro-union class members faced with this choice, we may defer to its judgment about whether (b)(1) or (b)(3) certification would be more advantageous. Until it informs us otherwise, however, we shall presume that it would prefer to protect the pro-union class members' rights to opt out of this litigation, so we shall certify the class under Rule 23(b)(3).

C. *Class Counsel*

When certifying a class, we "must appoint class counsel" who can "fairly and adequately represent the interests of the class." Fed.R.Civ.P. 23(g)(1)(A), (B). In making the appointment, we must consider:

> [1] the work counsel has done in identifying or investigating potential claims in the action,
>
> [2] counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
>
> [3] counsel's knowledge of the applicable law, and
>
> [4] the resources counsel will commit to representing the class.

---

55. Based on the evidence adduced so far, UNITE faces an uphill battle to avoid liability.

Fed.R.Civ.P. 23(g)(1)(C)(i). After considering all of these factors, we find that Spector Gadon can fairly and adequately represent the class's interests.

Spector Gadon investigated the named plaintiffs' claims and determined that a sufficient factual and legal basis existed to file a class action complaint. Before they filed the complaint, few courts had interpreted the DPPA, and the basis for the class's claim was not well established. Still, Spector Gadon executed a litigation strategy that results today in certification of a class action. From the motion to dismiss through discovery and now to class certification, Spector Gadon's extensive litigation experience has served the class well. *See* Rosen Decl. ¶ 8. Moreover, we cannot imagine that any firm is more knowledgeable than Spector Gadon about DPPA class actions, especially as they relates to federal labor law, because this case is the first of its kind. Cintas has agreed to advance the costs of this litigation, so we need not worry that insufficient resources will be available to protect the class's interests. Even if Cintas reneged on its commitment, we have no reason to doubt Spector Gadon's claim that it possesses the wherewithal to continue. *See* Rosen Decl. ¶ 9. In short, Spector Gadon can fairly and adequately represent the class's interests, so we shall appoint it as class counsel.

Appendix D

Conclusion

The named plaintiffs requested that we certify a class that could assert claims against UNITE, Raynor, and the Teamsters. We cannot allow a class action to proceed against Raynor or the Teamsters because plaintiffs failed to satisfy all four of the Rule 23(a) prerequisites with respect to those defendants. Though plaintiffs have demonstrated that we could certify a (b)(1)(A) class or a (b)(3) class to assert claims against UNITE, we believe that the unique circumstances of this case demand that the absent class members receive an opportunity to opt out. Thus, pursuant to Rule 23(b)(3), we shall certify a class consisting of all persons whose license plate numbers were used by UNITE, directly or indirectly, individually or jointly, as part of an effort to knowingly obtain, use and/or disclose personal information from motor vehicle records between July 1, 2002 and August 2, 2004.

An appropriate Order follows.

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 04-2841

ELIZABETH PICHLER, et al.

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES AFL-CIO), et al.

ORDER

AND NOW, this 31st day of May, 2005, upon consideration of plaintiffs' motion for class certification (docket entry # 56), their memorandum in support thereof, defendants' memoranda in opposition thereto, plaintiffs' reply brief, the declarations of Paul R. Rosen, Michael S. Friedman, and Thomas M. Kennedy, the affidavits of Joseph E. Kolick and Ahmer Qadeer, and the complete depositions of the named plaintiffs, the defendants' representatives, and Greg Hart, Jo Naccarato, and John Rea, and in accordance with the accompanying Memorandum and Fed.R.Civ.P. 23(c)(1)(A) and (g)(1)(A), it is hereby ORDERED that:

1. The claims of Kathleen Kelly, Carri Daubert, and Deborah Sabastro are DISMISSED for lack of standing;

2. Plaintiffs' motion for class certification is GRANTED IN PART;

3. Pursuant to Fed.R.Civ.P. 23(b)(3), a class is CERTIFIED to consist of: All persons whose license plate numbers were used by UNITE, directly or indirectly, individually or jointly, as part of an effort to knowingly obtain, use and/or disclose personal information from motor vehicle records between July 1, 2002 and August 2, 2004;

4. Spector Gadon & Rosen, P.C. is APPOINTED as class counsel; and

5. Counsel shall be prepared to discuss all issues relating to notice to the class at tomorrow's conference in chambers at 4:00 p.m.

BY THE COURT:

/s/ Stewart Dalzell, J.

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 13, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 04-2841

ELIZABETH PICHLER, et al.

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES AFL-CIO), et al.

MEMORANDUM

Dalzell, J. October 13, 2004

Plaintiffs, eight employees of Cintas Corporation and five of their relatives, allege that the Union of Needletrades, Industrial & Textile Employees AFL-CIO ("UNITE") attempted to organize Cintas employees during the winter of 2003 and 2004. To reach the employees, UNITE allegedly recorded license plate numbers from vehicles parked outside of Cintas's Allentown facility, used the license plate numbers to retrieve the addresses of the vehicles' owners from Pennsylvania motor vehicle records, and then contacted the owners at their homes. *See* Am. Compl. ¶ 43.

Appendix E

Contending that this alleged conduct violates the Driver's Privacy Protection Act of 1994 ("DPPA" or the "Act"),[1] plaintiffs initiated this action against UNITE, UNITE's president (Bruce Raynor), and the International Brotherhood of Teamsters AFL-CIO ("Teamsters," and collectively with UNITE and Raynor, the "Unions").

The Unions have filed motions to dismiss[2] making two principal arguments.[3] First, they maintain that, even

---

1. Pub.L. No. 103-322, §§ 300001-300003, 108 Stat. 1796, 2099-2102 (codified at 18 U.S.C. §§ 2721-2725).

2. The Court may grant a motion to dismiss under Rule 12(b)(6) "only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir.1997). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). In other words, we will not grant such a motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *see also Semerenko v. Cendant Corp.*, 223 F.3d 165, 173 (3d Cir.2000) (permitting dismissal "only if it appears that the [plaintiffs] could prove no set of facts that would entitle [them] to relief"). "The complaint will be deemed to have alleged sufficient facts if it adequately put the defendants on notice of the essential elements of the plaintiffs' cause of action." *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir.1996).

3. Apart from the two principal arguments discussed in the text, the Unions also maintain that the complaint fails to

(Cont'd)

assuming that the alleged activities occurred, the DPPA would not prohibit them. *See* Teamsters Br. at 3-9. Second, the Unions assert that we should dismiss this case because the National Labor Relations Board ("NLRB") has primary jurisdiction over their dispute with the plaintiffs. *See* UNITE Br. at 10-20. We consider each argument in turn.

I. *DPPA*

Unless one of its exceptions applies, the DPPA forbids state officials from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department [of motor vehicles] in connection with a motor vehicle record." 18 U.S.C. § 2721(a) (2004). It also prohibits others from "obtain[ing] or disclos[ing] personal information[ ] from a motor vehicle record" and from "mak[ing] false representation[s] to obtain any personal information from an individual's motor vehicle

---

(Cont'd)

make sufficiently specific allegations. *See* UNITE Br. at 4-9. Because the Unions' other arguments betray their full awareness of the claims against them, we hold that the complaint provides sufficient notice to comply with Fed.R.Civ.P. 8. *See also* Am. Compl. ¶ 65 (alleging that the Unions obtained personal information "for purposes not permitted by the DPPA"). Additionally, the Unions insist that the Norris-LaGuardia Act, 29 U.S.C. § 104 (2004), deprives us of authority to award the injunctive relief that the plaintiffs request. *See* UNITE Br. at 21-22. We take no position on this issue, preferring to reach remedial matters only if plaintiffs first establish liability.

record," unless one of the Act's exceptions applies. 18 U.S.C. § 2722 (2004). Violators are subject to criminal fines and civil liability to private plaintiffs. 18 U.S.C. §§ 2723-24 (2004).

In this case, the complaint plainly alleges that the Unions gained "access" to the plaintiffs' personal information from Pennsylvania motor vehicle records. Am. Compl. ¶ 43. Recognizing that this allegation states a prima facie case under the DPAA, the Unions rely on the Act's authorization of such access "[f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process [or] investigation in anticipation of litigation." 18 U.S.C. § 2721(b)(4) (2004) (the "litigation exception"). More specifically, the Unions maintain that the litigation exception applies here because the complaint alleges that they obtained the plaintiffs' personal information as part of a union organizing effort, activity protected under the National Labor Relations Act ("NLRA"). *See* 29 U.S.C. § 157 (2004).

The litigation exception would permit the Unions to obtain the plaintiffs' personal information for use in an actual, pending National Labor Relations Board ("NLRB" or the "Board") proceeding or for use in an "investigation in anticipation of" such a proceeding. Because the complaint never identifies any proceeding in which the Unions might use this information, the Unions invite us to take judicial notice of the many NLRB proceedings involving their efforts to organize

Cintas workers. Even if we took notice that some proceedings were pending before the NLRB, we could not discern for ourselves (without extensive review of the papers filed with the NLRB) either the issues in those proceedings or whether the Unions "use[d]" the plaintiffs' information in them. The parties have not supplied the kind of evidence that would permit this review, and, even if they had, we would not undertake it on a motion to dismiss. In short, we cannot grant the motion to dismiss on the grounds of the litigation exception because the complaint does not establish that the exception applies here.

After discovery has afforded the parties an opportunity develop their arguments, the Unions may be able to prove that the litigation exception permitted them to access the plaintiffs' personal information. Because this issue will probably arise again at the summary judgment stage, we briefly digress to explain how we interpret two critical parts of the litigation exception.

First, the exception applies only if a defendant obtains protected information for a permitted "use." As we construe the term, "use" implies a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding. For example, if the Unions claimed before the Board that Cintas somehow rigged a certification election so that the results did not accurately reflect the number of employees who wanted union representation, they would need to identify which employees actually desired such

representation. Obtaining personal information about employees to contact them regarding how they voted would be a permissible "use" because it is reasonably likely that the Board would need to know which employees supported unionization. On the other hand, the litigation exception would not apply if the Unions argued before the NLRB that Cintas engaged in an unfair labor practice by hiring security guards to keep them from recording employee license plate numbers because it is not reasonably likely that the Board would require any information about which employees parked in a particular lot to resolve the issue.

The second part of the litigation exception that deserves exposition is the phrase "investigation in anticipation of litigation." We understand the word "litigation" to encompass all manner of proceedings identified in § 2721(b)(4), including Board proceedings. More critically, however, for this portion of the litigation exception to apply, the Unions must prove that (1) they undertook an actual investigation; (2) at the time of the investigation, litigation appeared likely; and (3) the protected information obtained during the investigation would be of "use" in the litigation, as we interpreted that term above. This construction ensures that individuals' statutorily recognized rights to the privacy of their motor vehicle records are not sacrificed whenever a litigant raises the possibility of a tenuous connection between the protected information and issues tangentially related to a conceivable litigation strategy.

Appendix E

II. *Primary Jurisdiction*

The Unions also argue that we should dismiss this action because the NLRB has "primary jurisdiction . . . to balance the[ ] interests" implicated by the Unions' alleged violations of the DPAA. UNITE Br. at 11.

This argument rests on the principles that the Supreme Court articulated in the landmark case *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). There, the Court faced the question of whether a state court could order a union to pay damages to a lumber company when the basis of the union's liability was a state law that prohibited the union's picketing. Recognizing the problems posed by "the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes," the Court emphasized that "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency [*i.e.*, the NLRB], armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Id.*, 359 U.S. at 242, 79 S.Ct. at 778. To avoid conflict between state and federal regulation of labor relations, therefore, the Court held that, "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state

jurisdiction must yield." *Id.*, 359 U.S. at 244, 79 S.Ct. at 779. In other words, *Garmon* requires "the States to yield to the primary jurisdiction of the National Board" when "an activity is arguably subject to § 7 or § 8 of the Act." *Id.*, 359 U.S. at 245, 79 S.Ct. at 780. Premised as it was on the need to avoid federal-state conflict, *Garmon* simply does not apply to this case, which concerns the arguable conflict of two federal laws, the NLRA and the DPPA.

Of course, another line of cases recognizes that the Board's exclusive jurisdiction over complaints of unfair labor practices divests the district courts of power to interfere with the Board's functioning. *See, e.g., Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938). Even these cases, however, do not assist the Unions because the plaintiffs are not complaining of unfair labor practices. Plaintiffs here allege only that the Unions' conduct violated the DPPA, a federal law with which the NLRB has no expertise. Moreover, the NLRB has no jurisdiction-exclusive or otherwise-over the plaintiffs' DPPA claim because Congress has not authorized it to enforce that statute. Since the NLRB lacks the power to adjudicate DPPA claims, deferring to the Board here would effectively deny the plaintiffs any opportunity to vindicate their privacy rights under the DPPA.

For these reasons, the Unions' "jurisdictional" arguments essentially collapse into a plea that we should construe the DPPA as permitting the conduct at issue here. The Unions suggest that courts have long

approved of unions using information from motor vehicle records to contact employees during organizing campaigns. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540, 112 S.Ct. 841, 849, 117 L.Ed.2d 79 (1992) (discussing the union's "success" in contacting employees directly through home visits).[4] Because the DPPA's legislative history never mentions the Act's potential effects on this practice, the Unions ask us to infer that Congress intended not to prohibit it.

We may well agree that Congress probably did not consider carefully the effect that the DPPA would have on union organizing. But it is quite another matter to use such speculation as a basis upon which to infer that Congress affirmatively intended for the Unions' alleged conduct to be exempt from the DPPA. Though the Unions would have us in effect write a new paragraph (15) describing a "labor exception" to the DPPA and append it to the 14 paragraphs that Congress did choose to include in § 2721(b), we prefer to rely on the text of the Act. If Congress believes that the conduct at issue here should not be subject to the DPPA, it may amend § 2721(b). Rather than redraft the statute, however, we shall simply deny the Unions' motion to dismiss.

An appropriate Order follows.

---

4. The cases on which the Unions rely are neither uniform nor persuasive. Indeed, the Unions concede that some cases have found the gathering of license plate numbers to be impermissibly coercive, and the cases that do approve of the practice either predate the DPAA or do not discuss the Act's impact on it.

Appendix E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 04-2841

ELIZABETH PICHLER, et al.

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES AFL-CIO), et al.

ORDER

AND NOW, this 13th day of October, 2004, upon consideration of the defendants' motions to dismiss (docket entries # 8 and 10, and the plaintiffs' responses thereto, and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. Defendants motions to dismiss are DENIED; and

2. Defendants shall FILE their answers to the amended complaint by October 25, 2004.

BY THE COURT:

_____

Stewart Dalzell, J.

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 8, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 06-4522 & 06-4721

ELIZABETH PICHLER; KATHLEEN KELLY; RUSSELL CHRISTIAN; DEBORAH BROWN; SETH NYE; HOLLY MARSTON; KEVIN QUINN; JOSE L. SABASTRO; DEBORAH A. SABASTRO; THOMAS RILEY; AMY RILEY; RUSSELL DAUBERT; CARRI DAUBERT

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL A D TEXTILE EMPLOYEES, AFL-CIO), A NEW YORK UNINCORPORATED ASSOCIATION; BRUCE RAYNOR, A NEW YORK RESIDENT; INTERNATIONAL BROTHERHOOD OF TEAMSTERS ALF-CIO; DOES 1-10

UNITE HERE,

Appellant

SUR PETITION FOR REHEARING

Appendix F

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

MICHAEL A. CHAGARES
Circuit Judge

DATED: October 8, 2008

APPENDIX G — U.S. CODE, TITLE 18, CHAPTER 123 – PROHIBITION ON RELEASE AND USE OF CERTAIN PERSONAL INFORMATION FROM STATE MOTOR VEHICLE RECORDS

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) In general.—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): *Provided*, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

(b) Permissible uses.—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance

monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) **Resale or redisclosure.**—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b) (11) or (12)).

Appendix G

An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b) (11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver procedures.—A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(e) Prohibition on conditions.—No State may condition or burden in any way the issuance of an individual's motor vehicle record as defined in 18 U.S.C. 2725(1) to obtain express consent. Nothing in this paragraph shall be construed to prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

Appendix G

§ 2722. Additional unlawful acts

(a) Procurement for unlawful purpose.—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) False representation.—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

§ 2723. Penalties

(a) Criminal fine.—A person who knowingly violates this chapter shall be fined under this title.

(b) Violations by State department of motor vehicles.—Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

Appendix G

§ 2724. Civil action

(a) Cause of action.—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies.—The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

Appendix G

§ 2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof;

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

(4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information; and

(5) "express consent" means consent in writing, including consent conveyed electronically that bears an electronic signature as defined in section 106(5) of Public Law 106-229.

Supreme Court, U.S.
FILED
FEB 9 - 2009
OFFICE OF THE CLERK

No. 08-862

In The
Supreme Court of the United States

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES (AFL-CIO)),
Petitioner,

v.

ELIZABETH PICHLER, RUSSELL CHRISTIAN, SETH NYE, HOLLY MARSTON, KEVIN QUINN, JOSE SABASTRO, THOMAS RILEY, AMY RILEY, and RUSSELL DAUBERT, on behalf of themselves and those similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

PAUL R. ROSEN
Counsel of Record
DAVID B. PICKER
SPECTOR GADON & ROSEN, P.C.
1635 MARKET STREET, 7TH FLOOR
PHILADELPHIA, PA 19103
(215) 241-8888
(215) 241-8844 FAX

February 9, 2009 — *Attorneys for Respondents*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Whereas, the Drivers Privacy Protection Act, 18 U.S.C. §§ 2721–2725 ("DPPA"), a crime-prevention and privacy-protection statute, imposes civil liability for any knowing obtaining or use of personal information from motor vehicle records ("MVR Information"), unless it is for one of the specific purposes enumerated in section 2721, and criminal liability if the violation of the statute is "knowing"; and whereas this case arises out of Petitioner's use of MVR Information for union organizing purposes, and union organizing is not one of the permitted purposes enumerated in the statute:

1. Should the Court grant certiorari to consider whether a defendant who violates the DPPA by using MVR Information for a purpose not permitted by the statute can escape liability by also claiming a second purpose that is arguably permitted, where (a) the argument was waived because it was not briefed in any court below, (b) implying such a "safe harbor" would be contrary to the language and purpose of the statute, and (c) defendant admitted that the non-permitted purpose was its primary purpose?

2. Should the Court grant certiorari to engraft onto the statute an exception for "union organizing" that Congress did not provide for?

3. Should the Court grant certiorari to construe a statutory provision that was not the basis of the Court of Appeal's decision, and that is not the subject of a conflict of authority among the Circuit Courts?

4. Should the Court grant certiorari to engraft onto a civil liability statute a criminal *mens rea* requirement that is contrary to the statute as written and would defeat the statute's protective purposes?

5. Should the Court grant certiorari to review construction of a civil damages provision that is consistent with the statute's language and purpose, consistent with this Court's precedents, and as to which the Circuit Courts are in agreement?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

ADDITIONAL RELEVANT PROVISIONS OF THE STATUTE INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 6

A. THE THIRD CIRCUIT'S HOLDINGS ARE PLAINLY CORRECT, AND DO NOT CONFLICT WITH THIS COURT'S OR ANY CIRCUIT COURT'S HOLDINGS 7

1. The Third Circuit's "Dual Purpose" Holding Properly Effectuates The Language Of The DPPA, Is Consistent With "Mixed Motive" Cases, And Does Not Create Any Split Of Authority Among The Circuits 7

a. Because UNITE Did Not Brief Its "Mixed Motive" Argument In Either The District Court Or Court of Appeals, The Court Of Appeals Did Not Abuse Its Discretion By Deeming That Argument Waived 7

b. "Mixed Motive" Analysis Is Inapplicable To Construction Of The DPPA 9

c. UNITE Has Admitted That Its *Primary* Purpose Was Union Organizing 11

2. Certiorari Should Not Be Granted To Render An Advisory Opinion On Construction Of The DPPA's "Litigation Exception", Where The Court Of Appeals' Affirmance Was Not Based On That Exception And There Is No Conflict Of Authority Among The Circuit Courts 12

a. Petitioner Improperly Asks This Court To Review A Holding That The Third Circuit Did Not Make 12

b. The Decisions Below Were Correct, And There Is No Conflict Of Authority Among The Circuit Courts 13

3. The Third Circuit Properly Construed The "Knowledge" Requirement For Civil Liability, Despite UNITE's Attempt To Conflate That Provision With The Different Provision For Criminal Liability 15

4. The Third Circuit, Like The Eleventh Circuit, Properly Construed The Liquidated Damages Provision Of The DPPA 20

B. Petitioner Has Not Presented Issues Of Such Broad Public Importance And Unexpected Ramifications As To Warrant Certiorari Review 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Alabama v. Shelton,
535 U.S. 654 (2002) 13

Bryan v. United States,
524 U.S. 184 (1998) 16, 17

Caron v. U.S.,
524 U.S. 308 (1998) 19

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) 13

Colonial At Lynnfield, Inc. v. Sloan,
870 F.2d 761 (1st Cir. 1989) 23

Commissioner of Internal Revenue v. Groetzinger,
480 U.S. 23 (1987) 10

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 28

Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 10

Diamond v. Chakrabarty,
447 U.S. 303 (1980) 28-29

Doe v. Chao,
540 U.S. 614 (2004) 25-26

Fidelity Federal Bank & Trust v. Kehoe,
547 U.S. 1051 (2006) 29-30

Finkle v. Gulf & Western Mfg. Co.,
744 F.2d 1015 (3d Cir. 1984) 23

Gattis v. Snyder,
278 F.3d 222 (3d Cir. 2002), *cert. denied*,
537 U.S. 1049 (2002) 10

Irving v. Mazda Motor Corp.,
136 F.3d 764 (11th Cir. 1998) 8

Kehoe v. Fidelity Federal Bank & Trust Co.,
421 F.3d 1209 (11th Cir. 2005), *cert. denied*,
547 U.S. 1051 (2006) 20, 24, 26

Leocal v. Ashcroft,
543 U.S. 1 (2004) 20

Liparota v. U.S.,
471 U.S. 419 (1985) 20

Moskal v. U.S.,
498 U.S. 105 (1990) 19-20

National Park Hospitality Ass'n. v. Department of the Interior, 538 U.S. 803 (2003) 13

Peralta v. Heights Medical Center, Inc.,
485 U.S. 80 (1988) 13

Pichler v. UNITE,
446 F. Supp. 353 (E.D. Pa. 2006), *as amended*, 457 F. Supp. 524 (E.D. Pa. 2006), *aff'd in relevant part, rev'd in part on other grnds.*, 542 F.3d 380 (3d Cir. 2008) . . . . . *passim*

Pichler v. UNITE,
542 F.3d 380 (3d Cir. 2008) . . . . . *passim*

Pichler v. UNITE,
228 F. Supp. 2d 230 (E.D. Pa. 2005), *aff'd in rel. part*, 542 F.3d 380 (3d Cir. 2008) . . 16, 19, 20

Pichler v. UNITE,
339 F. Supp. 2d 665 (E.D. Pa. 2004) 14

Priebe & Sons, Inc. v. United States,
332 U.S. 407 (1947) 23

Reno v. Condon,
528 U.S. 141 (2000) 5, 24

Rex Trailer Co., Inc. v. United States,
350 U.S. 148 (1956) 23

Rios v. Direct Mail Express, Inc.,
435 F. Supp. 2d 1199 (S.D. Fla. 2006) 17

Skretvedt v. E.I. DuPont De Nemours,
372 F.3d 193 (3d Cir. 2004) 8

Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.,
525 F.3d 1107 (11th Cir. 2008) . 10-11, 13-14, 15, 17

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 8, 28

United States v. Bean,
537 U.S. 71 (2002) 8

U.S. v. Montejo,
442 F.3d 213 (4th Cir. 2006),
cert. denied, 549 U.S. 879 (2006) 17, 20

U.S. v. Thompson / Charter Arms Co.,
504 U.S. 505 (1992) 20

Wemhoff v. D.C.,
887 A.2d 1004 (D.C. App. 2005) 15

STATUTES

5 U.S.C. § 552a(g)(4) 25

18 U.S.C. § 1028(a)(1) 17

18 U.S.C. §§ 2721–2725 (Drivers Privacy Protection Act, or "DPPA") ..... *passim*

18 U.S.C. § 2721 1-2

18 U.S.C. § 2721(a) 5

18 U.S.C. § 2721(b) 5, 12, 15, 24

18 U.S.C. § 2722 18

18 U.S.C. § 2723 ..... 18, 20

18 U.S.C. § 2724 ..... *passim*

42 U.S.C. § 2000e-2(a)(1) 9

42 U.S.C. § 2000e-2(m) 10

RULES

Sup. Ct. R. 10(a) 13, 14

OTHER

E. Gressman, K. Geller, *et al.*, SUPREME COURT PRACTICE (9th ed., 2007) 12, 14

Restatement (2d) of Torts § 652H 24

Restatement (2d) of Torts § 652H, Comment *a* .. 24

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Plaintiffs-Respondents Elizabeth Pichler, Seth Nye, Kevin Quinn, Jose L. Sabastro, Thomas Riley, Amy Riley, Russell Daubert, Russell Christian, and Holly Marston respectfully file this Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner UNITE HERE ("Petitioner" or "UNITE").

ADDITIONAL RELEVANT PROVISIONS OF THE STATUTE INVOLVED

In addition to those quoted by Petitioner (Petition at 2–4), the following provisions of the Drivers Privacy Protection Act may be relevant to consideration of this matter:

18 U.S.C. §2721. Prohibition on release and use of certain personal information from State motor vehicle records

. . .

(a) In general.--A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual

obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): ...

(b) Permissible uses.--Personal information referred to in subsection (a) ..., subject to subsection (a)(2), may be disclosed as follows:

. . .

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self- regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

. . .

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

STATEMENT OF THE CASE[1]

This case arises out of UNITE's ongoing campaign to unionize Cintas Corporation. (Petition at 4–5, 14) As one of its methods, UNITE visited workers at their homes, to "discuss [workers'] experiences working at Cintas and their desire for union representation." (*Pichler v. UNITE*, 446 F. Supp. 353, 362 (E.D. Pa. 2006), *as amended*, 457 F. Supp. 524 (E.D. Pa. 2006), *aff'd in relevant part, rev'd in part on other grnds.*, 542 F.3d 380 (3d Cir. 2008), Pet.App. C at 89a [quoting UNITE officer] In those conversations, UNITE organizers sought to gauge interest in the union, and get workers to sign cards expressing their interest in unionizing. They also sought to dig up any issues, legal or otherwise, around which to agitate as part of UNITE's campaign. (*Id.*; Jt.App. 949 ¶18) UNITE admitted that its efforts to find and dig up claims "was part and parcel of its union organizing campaign ..." (UNITE 3d Cir. Br. at 32; *see also, Pichler*, Pet.App. A at 3a, 542 F.3d at 383.)[2] Indeed, UNITE itself argued that its supposed litigation efforts "could not be severed from" its union organizing campaign. (Pet.App. A at 31a–32a; 542 F.3d at 395)

---

[1] References to "Pet.App." are to the Appendices to UNITE's Petition. References to "Jt.App." are to the Joint Appendix filed in the Third Circuit.

[2] UNITE stipulated that its pursuit of litigation was merely a tactical component of its organizing campaign (Jt.App. 226, ¶21). UNITE's Vice President of Organizing admitted that "Sponsoring or hunting ... or digging up litigation ... is a corporate [organizing] campaign tactic, ..." (Jt.App. 1563 [at 201]).

To obtain the names and contact information of as many workers as possible "to contact at home as part of UNITE's Cintas campaign," in addition to several other available methods, UNITE used license plate numbers to access personal information from state motor vehicle records ("MVR") of persons whose automobiles it found in Cintas parking lots (called "tagging"). (*Pichler*, Pet.App. C at 79a-80a, 446 F. Supp. at 358 [*quoting* parties' Joint Stipulation]) UNITE stipulated that it used tagging "to contact workers as part of UNITE's organizing campaign" (Pet.App. C at 102a, 446 F. Supp. 2d at 367 [*quoting* parties' Joint Stipulation]). The true motivation for UNITE's instant Petition is that "For years, unions have used MVR information to identify and contact workers to discuss their rights to organize." (Petition at 5) A UNITE officer declared that "UNITE's ability to carry out its purposes will be significantly affected if it is unable to utilize motor vehicle information to assist its campaigns against employers like Cintas that ardently oppose unionization." (Jt.App. 968, ¶29)

"Tagging" is imprecise. When UNITE obtained a name and contact information from MVR, it did not know anything about that person — not even if they were actually employed by Cintas. (*Pichler*, Pet.App. C at 89a, 446 F. Supp. 2d at 362.) Indeed, Plaintiffs Christian, Marston, and Amy Riley are not employed by Cintas. (Pet.App. C at 86a, 446 F. Supp. 2d at 360-61)

"Tagging" also ignores the Drivers Privacy Protection Act, 18 U.S.C. §§ 2721–2725 ("DPPA"). The DPPA was enacted in 1994 by a Democratic Congress, and signed by a Democratic President, as a joint crime-prevention and privacy-protection statute. The DPPA

broadly prohibits *all* obtaining and use of personal information from motor vehicle records *except only* those uses *specifically enumerated* in 18 U.S.C. §2721(a) and (b). Notably, the purposes for which MVR information are used do not have to be unlawful or otherwise improper in order to violate the DPPA — the use itself is a violation if not expressly permitted.[3] Union organizing — or, in UNITE's formulation, "identify[ing] and contact[ing] workers to discuss their rights to organize" (Petition at 5) — is not among the purposes expressly permitted by section 2721.[4]

UNITE knew all about the DPPA. In 2000, UNITE was sued for violating the DPPA, and settled the case. (Pet.App. A at 10a fn.8, 542 F.3d at 387n.8; Pet.App. C at 93a-94a, 446 F. Supp. 2d at 364.) Despite this warning, UNITE continued its large-scale tagging activities against Cintas and other target companies — because UNITE believes tagging to be "'a valuable tool ... in organizing workers.'" (Pet.App. C at 95a, 446 F. Supp. 2d at 364-65 [*quoting* UNITE officer]).

---

[3] This evidences Congress's concern for protection of privacy in its own right. That concern is further demonstrated by the fact that Congress made clear that MVR information could not be used for bulk solicitations unless the individual expressly consented to such use. *See* 18 U.S.C. §2721(b)(11) and (12). *See generally, Reno v. Condon*, 528 U.S. 141, 144-45 (2000) (noting that one concern of Congress was the sale of motor vehicle information for commercial use).

[4] It is not correct, as Petitioner implies (Petition at 5n.2, that the use of MVR for union organizing has been approved by both the NLRB and the Courts. Two of the decisions Petitioner cites *pre*-date the DPPA, and none of those decisions considers the impact of the DPPA on this union organizing tactic.

REASONS FOR DENYING THE PETITION

UNITE's Petition should be denied for at least five separately sufficient reasons. Fundamentally, UNITE seeks to ask this Court to re-write the DPPA to engraft an exception, for union organizing activity, that Congress did not choose to provide. The relief that UNITE seeks is properly addressed to the legislative branch, and not to this Court.

Second, while the Third Circuit correctly held that UNITE's admitted purpose of union organizing violated the DPPA, UNITE seeks reversal based on a "mixed motive / primary purpose" analysis that UNITE never briefed in either court below, and raised for the first time only at oral argument in the Court of Appeals. The question of whether the Court of Appeals *abused its discretion* by not considering an argument that had not been briefed and was thus waived is not one that merits certiorari review.

Third, UNITE seeks an *advisory* construction of the statute that was not even the basis of the Third Circuit's decision. Thus, while UNITE argues that the *District* Court construed the litigation exception to the DPPA too narrowly, the Court of Appeals neither adopted nor relied on that construction in affirming the judgment against it. Nor is there any conflict of Circuit Court authority between the Eleventh Circuit's *obiter dicta* on, and the Third Circuit's non-construction of, the litigation exception.

Fourth, UNITE's arguments lack substantive merit. The decisions from which it seeks discretionary review were based on standard rules of construction and applicable caselaw properly applied to the

language and structure of the statute as crafted by Congress. Petitioner, by contrast, distorts the language of the statute and relies on cases that construed statutes with materially different language, in order to defeat the statute's purpose.

Lastly, the Petition is premature in any event, because the Third Circuit remanded the case for further proceedings which have yet to be had.

In short, the Petition should be denied because it seeks to create a precedent that is both unnecessary and erroneous.

A. THE THIRD CIRCUIT'S HOLDINGS ARE PLAINLY CORRECT, AND DO NOT CONFLICT WITH THIS COURT'S OR ANY CIRCUIT COURT'S HOLDINGS

1. The Third Circuit's "Dual Purpose" Holding Properly Effectuates The Language Of The DPPA, Is Consistent With "Mixed Motive" Cases, And Does Not Create Any Split Of Authority Among The Circuits

a. Because UNITE Did Not Brief Its "Mixed Motive" Argument In Either The District Court Or Court of Appeals, The Court Of Appeals Did Not Abuse Its Discretion By Deeming That Argument Waived

UNITE asks this Court to grant certiorari with respect to an issue it did not argue or brief, nor cite any of the cases it now cites, in either court below.

What UNITE did argue was that if it had "at least one" purpose that was permitted, that would immunize it from liability for a non-permitted purpose; in other words, that any permitted purpose would act as a "safe harbor", regardless of UNITE's admission that it also used MVR information for a purpose that was not permitted. *See Pichler*, Pet.App. C at 100a, 446 F. Supp. 2d at 367. Petitioner did not argue "mixed motive" nor cite any cases relevant to mixed motive in the District Court. Nor did Petitioner argue mixed motive or cite cases relevant thereto in the Third Circuit, despite the District Court's plain holding that its use of MVR information to further its organizing campaign subjected it to liability under section 2724(a).[5]

The general rule is that arguments not briefed are waived. *E.g.*, *Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 202-03 (3d Cir. 2004); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998). This Court also has held that it will not consider an issue raised for the first time in briefing on appeal to this Court. *United States v. Bean*, 537 U.S. 71, 75n.2 (2002); *see also*, *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below").

Although the Circuit Courts will, on certain narrowly defined occasions, address a pure issue of law that was otherwise waived (*Skretvedt, supra; Irving,*

---

[5] Petitioner persists in arguing that the District Court's pronouncement was not a holding, but mere "*dicta*". (Petition at 18) This is refuted by the "we hold" language used by the District Court on this issue. (Pet.App. C at 102a, 446 F. Supp. at 367-68).

supra), even the dissenting Judge below acknowledged that this was committed to that court's "exercise" of "discretion". (Pet.App. A at 50a, 542 F.3d at 403 (Sloviter, J., *dissenting*).) Whether or not the Court of Appeals *abused its discretion*, in refusing to address an issue that Petitioner had never briefed and only raised for the first time at oral argument, is not a legal issue of such public importance as to warrant certiorari review.

b. "Mixed Motive" Analysis Is Inapplicable To Construction Of The DPPA

Regardless of Petitioner's waiver of this argument, "mixed motive" analysis is inapplicable to the construction of the DPPA. As Petitioner itself notes, "Mixed motive cases most often arise in the *employment* context, where *statutes* prohibit employers from terminating employees for impermissible reasons." (Petition at 15 [emphasis added]) However, this is not an "employment" case. Rather, as Petitioner also acknowledges (Petition at 14), "This lawsuit arises out of UNITE's campaign to organize workers at Cintas, ..."

Unlike the DPPA, the statutes that prohibit employment discrimination specifically contemplate a mixed motive analysis. This follows from the causation element expressed in those statutes, but which is absent from the DPPA. For example, Title VII of the 1964 Civil Rights Act makes it an "unlawful employment practice for an employer ... to discriminate against any individual ..., *because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1) [emphasis added].

The "because of" language injects an express *causation* requirement into employment discrimination cases that is not present in the DPPA. Further, the 1991 Civil Rights Act codified standards for applying "mixed motive" analysis to the "because of" element of a Title VII case. *See* 42 U.S.C. §2000e-2(m). *See generally*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).[6]

Not only does the language of the DPPA not support a mixed motive analysis, but it supports the lower Courts' holdings with respect to the use of personal MVR information for two purposes, one permitted and one not permitted. Section 2724(a) expressly imposes liability for obtaining or using motor vehicle information "for a purpose not permitted under this chapter." It is the presence of a non-permitted purpose, not absence of a permitted purpose, that triggers liability.[7] Nothing in the statute provides a

---

[6] The same "causation" element distinguishes cases involving peremptory jury challenges, where the issue is whether the challenge was "caused" by a discriminatory motive. *E.g.*, *Gattis v. Snyder*, 278 F.3d 222, 234 (3d Cir. 2002), *cert. denied*, 537 U.S. 1049 (2002).

UNITE's and the dissenting judge's reliance (Petition at 17) on a *dictum* in *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23, 35 (1987), is misplaced. In *Groetzinger*, this Court construed the meaning of "trade or business" as used in certain sections of the Internal Revenue Code, and concluded that "if one's gambling activity is pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and is not a mere hobby, it is a trade or business within the meaning of the statutes ...." *Id.* *Groetzinger* did not engage in a "mixed motive" analysis, and sheds no light here.

[7] This is consistent with *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107 (11th Cir.

"safe harbor" if that non-permitted use is also coupled with a permitted use. Indeed, to imply such a "safe harbor" would be fundamentally absurd in light of the statute's clear (though not sole) aim to protect people from stalkers and other criminals. The decisions of the courts below were thus compelled by both the language and the purpose of the statute.[8]

c. UNITE Has Admitted That Its *Primary* Purpose Was Union Organizing

Even had UNITE not waived the argument, and even if some kind of "mixed motive" analysis were applicable to the unique language and structure of the DPPA, this case would still not present an appropriate vehicle for defining and applying that analysis. The reason is that UNITE *admitted* that its use of motor vehicle records was *primarily* for the impermissible purpose of union organizing. This is established by UNITE's own Stipulation and other affirmative admissions in the Record, as properly noted by the courts below (Pet.App. A at 32a–33a, 542 F.3d at

---

2008), holding that the burden is on plaintiff to prove that defendant had a purpose that was not permitted, and not on defendant to prove the existence of a permitted purpose as an affirmative defense.

[8] The dissenting Judge's willingness to transfer mixed-motive analysis from the discrimination context to a DPPA case, in spite of and without addressing these textual and contextual difficulties, demonstrates the wisdom of not addressing an argument that has not been preserved by proper briefing. The dissenting Judge's willingness to do so was apparently motivated by her personal belief in the benefits of union organizing (Pet.App. A at 48a, 542 F.3d at 402), and not by the language of the statute.

395–96; Pet.App. C at 87a–89a, 102a, 446 F. Supp. 2d at 361–62, 367–68). Indeed, UNITE affirmatively asserted that its alleged "litigation" purpose could not be severed from, but "was inextricably intertwined with its organizing motive" (Third Circuit Opinion, *id.*), which UNITE repeats in its instant Petition (at 18).

Therefore, UNITE would be liable even under a "primary purpose / secondary purpose" analysis, and certiorari review would serve no purpose. *E.g.*, E. Gressman, K. Geller, *et al.*, SUPREME COURT PRACTICE (9th ed., 2007), at 248 (certiorari will be denied where resolution of issue will not change result reached below).

2. Certiorari Should Not Be Granted To Render An Advisory Opinion On Construction Of The DPPA's "Litigation Exception", Where The Court Of Appeals' Affirmance Was Not Based On That Exception And There Is No Conflict Of Authority Among The Circuit Courts

a. Petitioner Improperly Asks This Court To Review A Holding That The Third Circuit Did Not Make

Remarkably, UNITE asks this Court to grant certiorari in order to render an *advisory* opinion as to the proper construction of 18 U.S.C. §2721(b)(4), the "litigation exception" to the DPPA — even though the Court of Appeals did *not construe* that provision nor base its affirmance upon it. *See* Pet.App. A at 31a, 542 F.3d at 395 ("We *need not address* the District Court's

interpretation of the litigation and the acting on behalf of government exceptions as we agree with the District Court that ... 'The act contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose.'" [Emphasis added]). It is a cardinal tenet of American jurisprudence that Courts will not provide advisory opinions on matters not in fact in controversy.[9] As this Court observed in a slightly different context, "We shall deal with the case as it came here and affirm or reverse based on the ground relied on below." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988). The Court should not grant certiorari to review a decision that the Court of Appeals did not make.

b. The Decisions Below Were Correct, And There Is No Conflict Of Authority Among The Circuit Courts

Not only does Petitioner seek an advisory opinion, but there is also no conflict of authority among the Circuit Courts that this Court need resolve. *Cf.* SUP. CT. RULE 10(a). As noted, the Third Circuit did not rule on the District Court's construction of the litigation exception, expressly affirming the judgment of the District Court on a different ground. On the other hand, the statement of the Eleventh Circuit in *Thomas, supra*, relied on by UNITE and the dissenting Judge, was a *dictum* as to an issue that court did not resolve, having ruled such issue waived. *Id.*, 525 F.3d

---

[9] *E.g.*, *National Park Hospitality Ass'n. v. Department of the Interior*, 538 U.S. 803, 811 (2003); *Alabama v. Shelton*, 535 U.S. 654, 676 (2002); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948) (citing cases).

at 1115n.5. *Cf. Pichler*, Pet.App. A at 32a fn.18, 542 F.3d at 395n.18. That *dictum* does not constitute legal "authority". The *obiter dictum* on an issue of one court and the express non-resolution of that issue by another court cannot constitute a "conflict of authority" among the Circuit Courts that this Court need resolve.[10]

Not only is there no *authority* in conflict, it is also significant that the *Thomas* decision involved facts materially different from those present here, so that even if the decisions there and below could be deemed "authority" as to the scope of the litigation exception, they would still not represent a true "conflict" requiring this Court's resolution.

Thomas involved a law firm that used motor vehicle records to identify witnesses who could testify to matters relevant to existing litigation against automobile dealers. No other use of motor vehicle records was proved. This is consistent with the opinion of the District Court here (Pet.App. D at 6, 339 F. Supp. 2d at 667).

On the other hand, the case at Bar involves indiscriminate "trolling" for and solicitation of claims in pursuit of union organizing. *See* Pet.App. C at 106a, 446 F. Supp. 2d at 369 (UNITE "stipulated that they were '*finding* potential legal claims' throughout the Cintas campaign" [quoting Joint Stipulation; emphasis of the Court]). The District Court properly held that

---

[10] Even if the *Thomas dictum* constituted "authority" in conflict with the District Court's decision here, a conflict between a Circuit Court and a District Court is not a basis for granting certiorari. Gressman, Geller, SUPREME COURT PRACTICE, *supra*, at 256; SUP. CT. RULE 10(a).

the litigation exception could not be stretched to cover such activity, which is more like the solicitation activity covered by the more restrictive (and therefore unavailable) section 2721(b)(12). *See also*, *Wemhoff v. D.C.*, 887 A.2d 1004 (D.C. App. 2005). To hold otherwise under the facts of this case would allow the litigation exception to completely swallow the rule, as correctly noted by both courts below (Pet.App. A at 34a fn.20, 542 F.3d at 396n.20, Pet.App. C at 106a-08a, 446 F. Supp. 2d at 369-70), and effectively grant to UNITE the "union organizing" exception that Congress plainly did not provide. *See Pichler*, Pet.App. A at 33-34a, 542 F.3d at 395-96.[11]

3. The Third Circuit Properly Construed The "Knowledge" Requirement For Civil Liability, Despite UNITE's Attempt To Conflate That Provision With The Different Provision For Criminal Liability

Section 2724(a) provides for civil liability against anyone "who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter ...." For two separately sufficient reasons, the Court should reject UNITE's request that it grant certiorari to consider UNITE's argument that, to be civilly liable under the DPPA, a defendant would not only have to

---

[11] That *Thomas* does not represent an actual conflict of authority is further proven by its failure to discuss the District Court's *Pichler* decision, nor *Wemhoff*, *supra* — both of which UNITE argues must be overturned solely on the strength of *Thomas*, though *Thomas* does not even cite to, much less purport to depart from, those cases.

know that it was accessing and using MVR information, but *also* know that doing so was not permitted by the DPPA.

First, this case is not an appropriate case to review the issue. As noted *supra*, UNITE is not some innocent *naïf* caught unawares by an obscure statute of which it had no knowledge. To the contrary, UNITE was fully aware of the DPPA, since it had previously been *sued* for violating it. Thus, even if, *arguendo*, the Court were inclined to ignore the well-established adage that "ignorance of the law is no excuse" (*e.g.*, *Bryan v. United States*, 524 U.S. 184, 195 (1998)), that would not alter the outcome here, because UNITE was by no means "ignorant". As the District Court here observed, "... the knowing nature of UNITE's acts is established. Indeed, if there were ever any doubt on this subject, UNITE's participation in *Tarkington* and its resolution removes it." (Pet.App. C at 114a–15a fn.42, 446 F. Supp. 2d at 373n.42.)

Second, and in any event, the courts below properly construed the DPPA's knowledge requirement according to settled norms of construction applied to the language of the statute, in which the words "knowingly" and "for a purpose not permitted" are separated from each other by an intervening clause; so that the "knowing" requirement applies only to the immediately following *action* (obtaining and use), and not to the *subsequently* described purpose. *See* Pet.App. A at 34a-35a fn.21, 542 F.3d at n.21; Pet.App. D at 139a-140a, 228 F.R.D. at 241-42. To hold otherwise would conflict with both grammar and

caselaw.[12] Indeed, this Court has repeatedly held that, even in the criminal context, unless the statute clearly indicates a contrary intent, the word "knowing" (as opposed to "willful") refers to knowledge only of the *facts* constituting the offense, and not knowledge of the law. *E.g.*, *Bryan v. U.S.*, 524 U.S. at 192-93 ("'knowingly' does not necessarily have any reference to a culpable state of mind" [*citing* cases]). The statute here contains nothing to indicate a contrary intent.

Nevertheless, UNITE seeks to create an issue for this Court by arguing that an enhanced *mens rea* is required under the so-called "rule of lenity", incorrectly arguing that the language of section 2724 is identical to the DPPA's criminal provision, so that "knowledge" sufficient for civil liability would also impose criminal liability. But this argument is fatally flawed, because it is premised on a glaring mischaracterization of the statute. Further, the rule of lenity is a guide of last-resort that cannot be used to alter the DPPA's clear language and structure.

---

[12] *E.g.*, *Rios v. Direct Mail Express, Inc.*, 435 F. Supp. 2d 1199, 1204-05 (S.D. Fla. 2006) ("under the express language of the DPPA the term 'knowingly' only modifies the phrase 'obtains, discloses, or uses personal information.' ... not ... the phrase 'for a purpose not permitted under this Chapter.'"). *Accord*, *Thomas*, 525 F.3d at 1111 ("*section 2724(a)* sets forth three elements giving rise to liability, i.e., that a defendant (1) knowingly obtained, disclosed or used personal information, (2) from a motor vehicle record, (3) for a purpose not permitted"). *Cf. U.S. v. Montejo*, 442 F.3d 213, 215-16 (4th Cir. 2006), *cert. denied*, 549 U.S. 879 (2006) (construing knowledge requirement in identity theft statute, 18 U.S.C. §1028(a)(1): "as a matter of common usage, 'knowingly' does not modify the entire lengthy predicate that follows it. ... Good usage requires that the limiting modifier, ... 'knowingly,' be as close as possible to the words which it modifies, ...").

Contrary to UNITE argument, the courts below properly understood that the DPPA has *separate* criminal and civil liability provisions, so that knowledge sufficient to warrant civil liability under section 2724(a) may not necessarily be sufficient to impose *criminal* liability. Section 2723(a) provides: "A person who *knowingly violates this chapter* shall be fined under this title." [Emphasis added] By contrast, under the civil liability provision of section 2724(a), *quoted supra*, it is not necessary to "knowingly violate [the] chapter." By its plain language, the DPPA sensibly provides for a different, and lesser, level of knowledge for imposition of civil, as opposed to criminal, liability.

UNITE's reliance on section 2722 does not help it. Indeed, UNITE's assertion that section 2722 "provides for criminal liability" (Petition at 24 and 26), and the courts below thus defined the word "knowingly" differently for the statute's civil and criminal provisions, is incorrect. Section 2722(a) makes it "unlawful" for "any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted by section 2721(b) ..." However, "unlawful" does not necessarily mean "criminal", and section 2722 does not impose any penalty whatsoever. Rather, criminal penalties are imposed by section 2723 (criminal fine), while civil damages and injunctive relief are provided by section 2724.[13] As noted, the clear language of section 2723

---

[13] Whether the Justice Department may enforce violations of section 2722(b) (Petition at 25) is irrelevant. *First*, the language of section 2722(b) is very different from that of section 2724(a). *Second*, the Justice Department's jurisdiction encompasses civil, as well as criminal, actions.

provides for a significantly different — and higher — knowledge requirement than section 2724.

Section 2724(b)(2)'s provision for punitive damages "upon proof of willful or reckless disregard of the law" confirms the fallacy of UNITE's construction. Because knowledge (or reckless disregard of the fact) that the conduct is not permitted by the DPPA warrants imposition of *punitive* damages, it follows that *non*-punitive damages do not require such knowledge. The Third Circuit properly rejected UNITE's proposed contrary construction as "incomprehensible". (Pet.App. A at 36a-37a, 542 F.3d at 397.)

Even worse, the construction Petitioner urges would require that civil liability could not attach until a defendant first read the statute and consulted with an attorney in order to determine whether or not a use was "permitted" — and even then, doubt would persist, as the District Court correctly observed. (Pet.App. D at 141a; 228 F.R.D. at 242.) Such a construction has no support in legal principles or the statutory language, and would in nearly all cases nullify the statute's protections.

In the face of these overwhelming textual and common sense barriers to its position, UNITE's reliance the "rule of lenity" is unavailing. The rule of lenity is a rule of last resort in construing a statute, and does not warrant, much less require, the absurd result UNITE seeks. *See, e.g.*, *Caron v. U.S.*, 524 U.S. 308, 316 (1998) (rule "does not apply if the ambiguous reading relied on is an implausible reading of the Congressional purpose;" interpreting federal firearms statute against defendant); *Moskal v. U.S.*, 498 U.S. 105, 108 (1990) (rule reserved for "those situations in

which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute"). On the other hand, the cases relied upon by Petitioner (Petition at 26)[14] are inapposite and do not conflict with the decisions below, because they construe significantly different statutes. They stand for the "principle that 'criminal offenses requiring no *mens rea* have a "generally disfavored status."'" *Pichler*, Pet.App. D at 142a fn.29; 228 F.R.D. at 242n.29. *Cf. Montejo*, *supra*, 442 F.3d at 216 (holding rule of lenity inapplicable). Petitioner's cases have no relevance here, because criminal liability under section 2723 *does* have a clear *mens rea* requirement, while *this* case involves the separate *civil* liability provision of section 2724.

Certiorari should not be granted where the courts below properly construed the word "knowingly" according to the DPPA's clear wording and structure, and there is no conflict with this Court's precedents nor among the Circuit Courts.

4. The Third Circuit, Like The Eleventh Circuit, Properly Construed The Liquidated Damages Provision Of The DPPA

Both courts below, and the Eleventh Circuit in *Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005), *cert. denied,* 547 U.S. 1051 (2006),

---

[14] *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *U.S. v. Thompson / Charter Arms Co.*, 504 U.S. 505 (1992); *Liparota v. U.S.*, 471 U.S. 419 (1985).

properly construed the two clauses of section 2724(b)(1) in the disjunctive, as alternative measures of damages. Petitioner asks this Court to grant certiorari, despite the obvious lack of conflict among the Circuit Courts, to consider an arcane grammatical argument that would frustrate clear Congressional intent.

Section 2724(b) provides in full:

> "(b) Remedies. – The court may award –
>
> (1) actual damages, but not less than liquidated damages in the amount of $2,500;
>
> (2) punitive damages upon proof of willful or reckless disregard of the law;
>
> (3) reasonable attorneys' fees and other litigation costs reasonably incurred; and
>
> (4) such other preliminary and equitable relief as the court determines to be appropriate."

UNITE's main argument (Petition at 29) is that "The court may award actual damages" is an *independent* clause, while "but not less than liquidated damages in the amount of $2,500" is a *dependant* clause that cannot stand on its own. The argument is erroneous because the phrase "The court may award actual damages" does not even exist as such in the statute. This is shown by both the language and also the physical structure of section 2724(b), as set forth

supra.[15] Thus the section begins with the pre-amble "The court may award –", followed by four separate categories of remedies: (1) compensatory damages with alternative measures of calculation, that is, either actual or liquidated damages of $2,500; (2) punitive damages; (3) attorneys' fees; (4) and injunctive relief.

UNITE's argument ignores the grammatical structure of the statute — including the "dash" after "may award," which Petitioner conveniently leaves out. By doing so, it is UNITE who would re-write the statute as crafted by Congress. When the provision's wording and structure — including the "dash" — are given their proper effect, the alternative or disjunctive meaning of the provision is clear:

> "(b) Remedies. – The court may award –
>
> (1) *[i]* actual damages, *[ii]* but not less than liquidated damages in the amount of $2,500; ..."

This is how both the Third Circuit and the Eleventh Circuit construed the provision, which is consistent with its language, purpose, and structure.

The courts below and the Eleventh Circuit also properly understood the significance of the provision's reference to "liquidated damages". Petitioner's attempt to narrow the meaning of that term as used in section 2724(b)(1) is unpersuasive — particularly in the context of this privacy protection statute that

---

[15] UNITE itself argues that the Court must consider the "statute's text, language, punctuation, structure and subject matter." (Petition at 29)

makes unlawful a broad range of uses of MVR information which would not otherwise be unlawful *but for* the invasion of the privacy of motor vehicle records. This is very different, for example, from *Finkle v. Gulf & Western Mfg. Co.*, 744 F.2d 1015 (3d Cir. 1984), and *Colonial At Lynnfield, Inc. v. Sloan*, 870 F.2d 761 (1st Cir. 1989), relied on by Petitioner, which were commercial contract cases decided under state law, in which not only did the plaintiff suffer no injury, but the liquidated damages were grotesquely disproportionate because they were orders of magnitude *greater* than the $2,500 provided for by Congress here. Similarly, in *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947), this Court refused to enforce, as disproportionate, a liquidated damages clause allegedly triggered by a technical default that had no impact on the delivery of the goods in question. *Id.*, 332 U.S. at 411-13.

On the other hand, in *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148 (1956), this Court upheld liquidated damages of $2,000 per violation of the Surplus Property Act, despite the government's failure to allege specific damages (350 U.S. at 151-52), observing that "the fact that no damages are shown is not fatal." *Id.*, at 153. In light of *Rex Trailer*, moreover, the Congressionally-determined liquidated damages in section 2724(b)(1) cannot be considered "disproportionate" or a "penalty".

Unlike *Rex Trailer* and this case, none of the cases relied upon by Petitioner construed a Congressional statute. Equally important, none even remotely involved the non-commercial context in which Congress was legislating when it enacted the DPPA. Instead of proscribing use of personal motor vehicle

information for specific "harmful" or otherwise "wrongful" purposes, Congress chose to proscribe *all* uses of such information, *except* those specifically enumerated in section 2721(b). This includes, for example, otherwise innocuous uses such as bulk solicitations that would not be expected to cause any tangible harm, yet which Congress clearly proscribed and for which it clearly sought to provide a damages remedy. *E.g.*, *Reno v. Condon*, *supra*.

The construction placed on section 2724(b)(1) by the courts below and the Eleventh Circuit properly effectuates Congress's clearly expressed purpose to provide a remedy for violations of the privacy interests it was seeking to protect. This, in turn, is wholly consistent with existing legal principles concerning the remedies available for various invasions of privacy. *Restatement (2d) of Torts* § 652H and Comment *a* thereto, along with numerous cases as cited by the Third Circuit (*Pichler*, Pet.App. at 40a, 542 F.3d at 398-99), confirm that the invasion of privacy is itself an injury, for which victims are entitled to be compensated, without regard to any physical or economic injury. The Third Circuit properly agreed with the Eleventh Circuit in *Kehoe*, that liquidated damages are therefore particularly appropriate to remedy violations of privacy. *See Pichler*, Pet.App. A at 41a, 542 F.3d at 399, *quoting Kehoe*, 421 F.3d at 1213.[16]

---

[16] While Petitioner deems it "ironic[]" that the Third Circuit relied on the Eleventh Circuit in *Kehoe*, which in turn relied on the District Court below (Petition at 29 and fn.8), it is precisely this *consensus* in the lower courts that militates against granting certiorari.

Nevertheless, in an attempt to create a "conflict" of authority where none exists, UNITE relies on *Doe v. Chao*, 540 U.S. 614 (2004). However, as the *Doe* Court made clear and the District Court, Third Circuit and Eleventh Circuit all properly recognized, *Doe* is inapplicable, because it involved an entirely different statute, with materially different statutory language,[17] and a materially different legislative history.

Doe construed the Federal Privacy Act, which sets forth the limited circumstances under which federal agencies waive their sovereign immunity and may be held liable for damages arising out of their intentional misuse of personal information. Central to this Court's conclusion that monetary recovery under the Privacy Act was not available in the absence of tangible injury was its interpretation of the phrases: "sustained by the individual" and "person entitled to recovery" — language that does not appear in the DPPA. The Court considered the "person entitled to recovery" language in the Privacy Act to be limiting language, and was concerned that accepting plaintiff's

---

[17] The relevant text of the Privacy Act provides:

> "In any suit brought under the provisions of subsection *(g)(1)(C)* or *(D)* of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages *sustained by the individual* as a result of the refusal or failure, but in no case shall a *person entitled to recovery* receive less than the sum of $1,000; and ..." [Emphasis added]

5 U.S.C. §552a(g)(4).

argument there would read that language right out of the statute. *Id.*, 540 U.S. at 620.

At the same time, however, this Court acknowledged that language similar to that in the DPPA would accomplish the purpose of allowing a statutory minimum recovery regardless of "actual", tangible harm:

> "As Doe treats the text, Congress could have accomplished its object simply by providing that the Government would be liable to the individual for actual damages 'but in no case ... less than the sum of $1,000' plus fees and costs. Doe's reading leaves the reference to entitlement to recovery with no job to do, and it accordingly accomplishes nothing."

540 U.S. at 623. Thus, absent the "sustained by the individual" and the "person entitled to recovery" limiting language, this Court would have *agreed* that the statute provided for statutory minimum damages. Because the "critical limiting phrase" relied on by this Court in *Doe* (540 U.S. at 626) is absent from the DPPA, far from "conflicting" with *Doe*, the decisions below (and of the Eleventh Circuit in *Kehoe*), are fully consistent with, and even supported by, *Doe*'s analysis.

Because the construction of section 2724(b)(1) by the courts below *and* by the Eleventh Circuit in *Kehoe* was correct, and because it represents a consensus among the lower courts, certiorari should be denied.

B. Petitioner Has Not Presented Issues Of Such Broad Public Importance And Unexpected Ramifications As To Warrant Certiorari Review

In view of the correctness of the Third Circuit's decision and the consensus among the lower courts, UNITE has failed to establish that this case raises issues of such broad public importance as to warrant certiorari. Nevertheless, UNITE refers to the "volume and diversity of DPPA cases in recent years" (Petition at 33) in support of its contrary argument. Yet as evidence of that "volume and diversity", Petitioner points to only seven (7) cases decided by all state and federal courts combined within the past five years. (*Id.*, at 33–35) This is underwhelming — particularly so in light of the absence of serious disagreement as to the DPPA's interpretation demonstrated by those cases.

UNITE's further arguments as to the potential "chilling effect" on "persons and entities with a variety of legitimate needs" (Petition at 35) is unsupported by any evidence and wholly speculative. Nor can UNITE point to anything in the statute's language to indicate that Congress did not *want* to chill invasions of privacy into personal information that the government forces individual vehicle owners to supply.[18]

---

[18] Petitioner gives as an example the possibility that a car company using personal information to contact a car owner about a safety recall (permitted) might be potentially liable for solicitation of business (clearly *not* permitted). (Petition at 35) It is significant that Congress manifested its concern that motor vehicle owners be "left alone" by strengthening the restriction against use of motor vehicle records for commercial solicitation,

To the contrary, UNITE's and the dissenting Judge's assertions that Congress "never considered" some of these issues (Petition at 35; Pet.App. A at 48a, 542 F.3d at 402), is sheer speculation. Moreover, their speculation merely confirms that they would rewrite the statute as Congress crafted it, to engraft onto it a "union organizing" exception that Congress did not put there. But this violates settled rules of construction. The courts are bound to construe statutes as written. *E.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("we have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). And as this Court has held, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW v. Andrews*, 534 U.S. at 21. There is no such evidence here.

Indeed, even if Petitioner's and the dissenting Judge's speculation were correct, they do not explain why the remedy for such lack of "consideration", if any, should lie with this Court and not with Congress itself. Certiorari should not be granted to "correct" what may be perceived to be an "error of judgment" by Congress. *E.g.*, *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980) ("'[our] individual appraisal of the wisdom or unwisdom of a particular [legislative] course ... is to be put aside in the process of interpreting a statute'"

---

changing it from "opt out" to express "opt in". Petitioner does not explain how using the vehicle safety exception to the DPPA's prohibitions as a cover for non-permitted commercial solicitation furthers some fundamental public policy that warrants this Court's protection.

[brackets and ellipses of the Court; citation omitted]). To the contrary, the balancing of competing societal interests is a uniquely *legislative* function (*id.*, at 317), and this Court should not grant certiorari to substitute its own judgment for that of Congress in deciding how best to balance those competing interests.

Finally, Petitioner's reliance on the opinion of Justice Scalia, joined by Justice Alito, concurring in the denial of certiorari in *Fidelity Federal Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006), is unavailing. In *Kehoe*, the State of Florida sold to a commercial solicitor the names on its motor vehicle data base, despite Congress's amendment of the DPPA to prohibit such sales except when a driver had expressly consented. Justice Scalia expressed concern that the potential liability for class actions arising out of this misfeasance by the State could amount to $40 *billion*. This was a particular concern if a defendant could "be held liable under the Act if it did not know that the *State* had failed to comply with the Act's 'express consent' requirement." *Id.* [emphasis added].

The concerns that caught the concurring Justices' attention in *Kehoe* are not present here. *First*, there is no issue here of whether Petitioner could be liable without knowing that a *State agency* had violated the law. Rather, Petitioner knowingly obtained and used MVR to further its union organizing campaign, with full knowledge of the DPPA and knowing that "union organizing" was not a "permitted purpose" under the statute. Indeed, as the District Court here noted, "Justice Scalia's concern does not touch upon our case because the knowing nature of UNITE's acts is established." Pet.App. C at 114a–15a fn.42, 446 F. Supp. 2d at 373n.42.

Second, the judgment being appealed from totals only $22,500. Moreover, the liability to the entire class has not yet been determined, so it would be premature to grant certiorari based on concern over the size of an award that has not been made. Nevertheless, the maximum potential award here is orders of magnitude *lower* than the potential that concerned the concurring Justices in *Kehoe*.

CONCLUSION

For all of these reasons, UNITE has failed to establish any compelling reason for this Court to issue a Writ of Certiorari. UNITE's Petition should be denied.

Dated: February 9, 2009

Respectfully submitted,

PAUL R. ROSEN
Counsel of Record
David B. Picker
SPECTOR GADON & ROSEN, P.C.
1635 Market Street, 7th Floor
Philadelphia, PA 19103
(215) 241-8888
(215) 241-8844 Fax
Attorneys For Plaintiffs-Respondents

121

(3)

No. 08-862

Supreme Court, U.S.
FILED
FEB 24 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES (AFL-CIO)),

Petitioner,

v.

ELIZABETH PICHLER, RUSSELL CHRISTIAN, SETH NYE, HOLLY MARSTON, KEVIN QUINN, JOSE SABASTRO, THOMAS RILEY, AMY RILEY, and RUSSELL DAUBERT, on behalf of themselves and those similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

LAWRENCE T. HOYLE, JR.
Counsel of Record
ARLENE FICKLER
ARLEIGH P. HELFER III
JOHN R. TIMMER
HOYLE, FICKLER, HERSCHEL & MATHES LLP
One South Broad Street
Suite 1500
Philadelphia, PA 19107
(215) 981-5700

Attorneys for Petitioner UNITE

221245

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO RULE 29.6 ...	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
ARGUMENT	3
A. This Petition Properly Presents This Court With The Opportunity To Resolve The Fundamental Issue Regarding The Liability Of Persons Who Use MVR Information For Two Purposes.	3
1. UNITE Is Not Seeking a Union Organizing Exception to the DPPA.	4
2. The "Mixed Motives" Argument Was Not Waived Because UNITE Has Consistently Argued That It Had Two Purposes for Obtaining the MVR Information.	5
3. UNITE Is Not Seeking an Advisory Opinion on the Interpretation of the DPPA's Permitted Use for Litigation.	8

Contents

Page

B. Certiorari Should Be Granted Because The Third Circuit's Conclusion That The Term "Knowingly" Means Something Different In The Criminal And Civil Liability Sections Of The DPPA Contravenes This Court's Prior Decisions. 9

C. Certiorari Should Be Granted Because The Third Circuit Failed To Apply Fundamental Principles Of Statutory Construction In Interpreting The DPPA's Actual Damages Provision. 11

D. This Petition Is Ripe For Supreme Court Review. 13

CONCLUSION 14

TABLE OF CITED AUTHORITIES

Page

Cases

Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 8

Bryan v. United States, 524 U.S. 184 (1998) 10

Commissioner of Internal Revenue v. Lundy, 516 U.S. 235 (1996) 9

Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 9

Doe v. Chao, 540 U.S. 614 (2004) 12

Fidelity Federal Bank & Trust v. Kehoe, 547 U.S. 1051 (2006) 13, 14

Hercules, Inc. v. United States, 516 U.S. 417 (1996) 8

Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995) 5

Liparota v. United States, 471 U.S. 419 (1985) 9, 10

Cited Authorities

Page

Pichler v. UNITE,
446 F. Supp. 2d 353 (E.D. Pa.), *as amended*,
457 F. Supp. 2d 524 (E.D. Pa. 2006),
aff'd in part and rev'd in part,
542 F.3d 380 (3d Cir. 2008) ..... *passim*

Pichler v. UNITE,
542 F.3d 380 (3d Cir. 2008) ..... *passim*

Pichler v. UNITE,
No. 04-2841 (E.D. Pa. Apr. 15, 2008)
(Docket No. 257), *appeal pending*,
No. 08-2354 (3d Cir.). 13

Quackenbush v. Allstate Insurance Co.,
517 U.S. 706 (1996) 8

Rex Trailer Co., Inc. v. United States,
350 U.S. 148 (1956) 12

Yee v. City of Escondido,
503 U.S. 519 (1992) 5

Cited Authorities

Page

Statutes

Driver's Privacy Protection Act,
18 U.S.C. §§ 2721-2725 ..... *passim*

National Labor Relations Act,
29 U.S.C. § 158 1

Privacy Act,
5 U.S.C. § 552a 12

42 U.S.C. § 2000e 6-7

Rules

SUPREME COURT RULE 10(c) 6

Other Authorities

Cintas Corp. and UNITE HERE,
N.L.R.B., Cases 4–CA–34160,
4–CA–34161, and 4–CA–34345
(Jan. 30, 2009). 1

INTRODUCTION

Plaintiffs contend that UNITE's petition for certiorari should be denied for five reasons. (Opposition at 6-7). Each of their arguments lacks merit:

(1) UNITE is not seeking a "union organizing" exception to the DPPA but rather an explication of the proper analysis for determining the liability of anyone who accesses MVR information with mixed motives;

(2) Having consistently disputed whether UNITE can be held liable when it was motivated to obtain MVR information both to organize Cintas employees and to obtain information for litigation against Cintas, UNITE did not waive the dual purpose issue;

(3) UNITE is not seeking an advisory opinion about the DPPA's permitted use for litigation because a predicate of UNITE's dual purpose argument is its motivation to obtain information for litigation against Cintas[1];

(4) The Third Circuit failed to apply the Court's fundamental principles of statutory

---

1. That litigation included NLRB proceedings concerning Cintas' violation of Section 8(a) of the NLRA. *Cintas Corp. and UNITE HERE*, N.L.R.B., Cases 4–CA–34160, 4–CA–34161, and 4–CA–34345 (Jan. 30, 2009).

construction when it held that "knowingly" meant something different in the civil and criminal provisions of the DPPA, thus reading Section 2722(a) out of the act, and when it misconstrued the actual damages provision, disregarding its structure and failing to apply the common law meaning of "liquidated damages"; and

(5) This petition is not premature because the issues presented will not be further litigated on remand of the affirmed summary judgment for determination of the amounts of liquidated and punitive damages to be awarded to plaintiffs and over 1700 class members.

Certiorari should be granted because the proper interpretation of the questions presented by UNITE is central to the DPPA's enforcement and their resolution by this Court is needed as parties litigate the privacy claims created by the act.

ARGUMENT

A. THIS PETITION PROPERLY PRESENTS THIS COURT WITH THE OPPORTUNITY TO RESOLVE THE FUNDAMENTAL ISSUE REGARDING THE LIABILITY OF PERSONS WHO USE MVR INFORMATION FOR TWO PURPOSES.

The central issue in this litigation – raised in the district court, the Third Circuit, and this Court – is whether UNITE violated the DPPA by obtaining MVR information for two purposes, a permitted purpose (in anticipation of litigation) and a non-permitted purpose (union organizing). Throughout this litigation, plaintiffs have made two arguments for imposing liability on UNITE, both of which UNITE has contested. First, they argue that the presence of a non-permitted purpose violates the DPPA, making any permitted purpose motivating the same conduct irrelevant. Second, they argue that, even if UNITE's non-permitted purpose is not an automatic violation, UNITE had no permitted purpose because the DPPA's permitted litigation use was inapplicable.

Both lower courts found in favor of plaintiffs, but for different reasons. Whereas the district court based its holding on its finding that UNITE's purpose was not within the litigation exception (App.101a) ("the question of partially permissible uses is not pertinent because there was no permissible use"), the Third Circuit did not address the litigation exception because it found that a non-permissible purpose alone triggered liability (App.31a) ("Because UNITE obtained and used the confidential information for an impermissible purpose – union organizing – it does not matter what other permissible purpose UNITE may have had.").

Plaintiffs make three arguments that misconstrue this history and the applicable law.

1. UNITE Is Not Seeking a Union Organizing Exception to the DPPA.

The DPPA allows a person to obtain MVR information for a permitted use and imposes liability when MVR information is obtained for a non-permitted use, but it is silent concerning the liability of a person whose use of MVR information is motivated by both permitted and non-permitted purposes. UNITE is not seeking a declaration that union organizing is a fifteenth permitted use under the DPPA, but the answer to a fundamental question of statutory interpretation – when liability can be imposed when MVR information is obtained for two purposes, one permitted and one not.

The Third Circuit's holding has the effect of incorporating a union *exclusion* from the DPPA because it prevents a union from ever coming within the DPPA, given that its ultimate goal – union organizing – is itself enough to negate any other permitted purpose pursuant to the DPPA. Similarly, businesses could be precluded from accessing MVR information for permitted purposes because of their profit-maximizing motive.

Thus, the dual purpose question extends beyond unions and labor disputes. People often – perhaps even usually – have multiple purposes for taking a particular action. Rather than engrafting a "union exception" onto the DPPA, reversal of the Third Circuit's holding would provide needed guidance concerning the situation where MVR information is accessed for multiple reasons.

2. The "Mixed Motives" Argument Was Not Waived Because UNITE Has Consistently Argued That It Had Two Purposes for Obtaining the MVR Information.

Plaintiffs' second argument relating to the dual purpose issue is that UNITE waived the "'mixed motive' argument" set forth in the petition for certiorari because it did not "argue or brief, nor cite any of the cases it now cites, in either court below." (Opposition at 7).

This argument misconstrues the law of this Court. This Court has repeatedly recognized that it may consider arguments that were not raised in the courts below, provided that the issue presented was properly preserved. *See, e.g., Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (allowing petitioner to raise an argument for the first time before this Court, stating "[o]ur traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'") (citations omitted); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (distinguishing between claims, which can be waived, and arguments in support of the claims, which cannot, and noting: "[h]aving raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.").

Here, there is no question that UNITE has preserved the *claim* that the Third Circuit misinterpreted the DPPA by finding that an actor with both permitted and non-permitted purposes

automatically violates the DPPA. Indeed, UNITE has contested the issue of the liability of an actor with two purposes in the district court, the Third Circuit, and in the Question Presented to this Court. (Petition at *i*). Therefore, whether UNITE made the "mixed motives" argument to the Third Circuit has no bearing on *this* Court's ability to consider it.

Because the Third Circuit's interpretation of this issue – that any non-permitted purpose, however slight, automatically requires a finding of liability – conflicts with this Court's interpretation of liability when a defendant acts with both a permissible and a non-permissible purpose set forth in the "mixed motives" cases, this Court should grant this petition.

Moreover, more than simply representing an argument on the merits, the "mixed motives" cases cited in UNITE's petition demonstrate the conflict between the Third Circuit's decision and this Court's prior decisions and therefore demonstrate why certiorari should be granted. *See* SUP. CT. R. 10(c). The "mixed motives" cases reflect this Court's interpretation of laws prohibiting certain actions based on the purpose for which they were done in situations where the defendant performed the action for both permitted and non-permitted purposes.

Plaintiffs' efforts to distinguish the "mixed motives" cases are unavailing. Plaintiffs argue that the "mixed motives" analysis is inapplicable to the DPPA because there is an "express causation requirement" in the "mixed motives" cases that is not present in the DPPA. However, both Title VII and the DPPA prohibit certain

actions (*e.g.*, terminating an employee or obtaining MVR information) if the actor's purpose for the action is prohibited by the statute, but do not prohibit the same actions if the actor's purpose is not prohibited. Because the cases interpreting Title VII demonstrate how this Court has addressed situations where an actor has both a permissible and a non-permissible purpose, the "mixed motives" cases are directly relevant here.

Further, plaintiffs wrongly contend that "UNITE *admitted* that its use of motor vehicle records was *primarily* for the impermissible purpose of union organizing." (Opposition at 11). Rather than citing to UNITE's alleged admission, plaintiffs cite to the lower courts' opinions, none of which engaged in the balancing test required by this Court's "mixed motives" precedents. The district court held that UNITE did not satisfy its improperly stringent interpretation of the litigation exception (App.106a-08a); and the Third Circuit held that any impermissible purpose, whether primary or secondary, provided a basis for imposing liability (App.31a). Both courts reached these conclusions based on UNITE's admission that it had two integrated purposes, but UNITE never admitted that organizing was its primary purpose. Applying this Court's "mixed motives" analysis to the DPPA would require a remand of this case for a determination – by a jury in light of UNITE's view of the record below – whether liability could be imposed in light of UNITE's mixed motives.

3. UNITE Is Not Seeking an Advisory Opinion on the Interpretation of the DPPA's Permitted Use for Litigation.

Plaintiffs' final argument relating to the dual purpose issue is that this Court's consideration of the litigation exception would amount to an advisory opinion. (Opposition at 12-13). It is difficult to conceive how this case could involve an advisory opinion as there is no question that a "case or controversy" exists concerning the interpretation of the litigation exception. The dual purpose question presumes that UNITE had a permitted purpose. UNITE has consistently maintained that its use was permitted because it was an "investigation in anticipation of litigation." 18 U.S.C. § 2721(b)(4) (App.212a). Indeed, this was the determinative issue in the district court's decision.

Moreover, plaintiffs' contention that this Court must "affirm or reverse based on the ground relied on below" (Opposition at 13) is belied by the numerous opinions in which this Court has affirmed "on grounds different from those provided by" the court below. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711 (1996); *see also Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996); *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 572 (1987).

B. CERTIORARI SHOULD BE GRANTED BECAUSE THE THIRD CIRCUIT'S CONCLUSION THAT THE TERM "KNOWINGLY" MEANS SOMETHING DIFFERENT IN THE CRIMINAL AND CIVIL LIABILITY SECTIONS OF THE DPPA CONTRAVENES THIS COURT'S PRIOR DECISIONS.

The Third Circuit's holding that the term "knowingly" means something different in the civil and criminal provisions of the DPPA[2] raises important issues of statutory interpretation. *See Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 250 (1996); *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). Plaintiffs' defense of the holding demonstrates why this Court should grant certiorari. After criticizing UNITE's interpretation of "knowingly" in Section 2724(a) as requiring that "a defendant first read the statute and consult[] with an attorney in order to determine whether or not a use was 'permitted,'" plaintiffs argue that criminal liability is imposed not by Section 2722(a), but by Section 2723 which provides that "a person who knowingly violates this chapter shall be fined under this title." (Opposition at 18-20). There are three problems with this argument.

First, this Court's decision in *Liparota v. United States*, 471 U.S. 419 (1985), which the Third Circuit never addressed, supports UNITE's argument that the term "knowingly" in the DPPA requires an appreciation of wrongfulness. As this Court stated in *Liparota*, liability

---

2. The court "[held] that Congress differentiated between a knowing acquisition, disclosure or use to establish civil liability, and any knowing violation to establish liability for a criminal fine." (App.36a).

for a person who knowingly uses food stamp coupons in any manner not authorized by the statute does not require that the defendant "had knowledge of specific regulations"; rather, it could be proved through circumstantial evidence that the defendant "knew that his conduct was unauthorized or illegal." *Id.* at 434.

Second, plaintiffs' own interpretation of the criminal provision leads to exactly the bizarre result that they attempt to attribute to UNITE's interpretation. To be criminally liable under plaintiffs' interpretation, a person must "knowingly violate this chapter." 18 U.S.C. § 2723. It is *this* interpretation of the DPPA, not UNITE's, that provides for liability only if the defendant had "first read the statute and consulted with an attorney in order to determine whether or not a use was 'permitted.'" Such an interpretation would run counter to the "well-established adage" cited by plaintiffs that "ignorance of the law is no excuse." (Opposition at 16, citing *Bryan v. United States*, 524 U.S. 184, 195 (1998)).

Finally, plaintiffs fail to account for Section 2722(a). Under plaintiffs' interpretation, Section 2723 provides for criminal liability and fines, while Section 2724 provides for civil liability and remedies (Opposition at 20); but they fail to address Section 2722(a). By reading Section 2722(a) out of the DPPA, plaintiffs demonstrate the error of their position.[3]

---

3. Plaintiffs' contention that the interpretation of the knowingly requirement is a non-issue because of the district court's statement that the "knowing nature of UNITE's acts is established" (Opposition at 16) is without merit because UNITE's knowledge of the wrongfulness of its conduct is a disputed issue of material fact that a jury must resolve.

C. CERTIORARI SHOULD BE GRANTED BECAUSE THE THIRD CIRCUIT FAILED TO APPLY FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION IN INTERPRETING THE DPPA'S ACTUAL DAMAGES PROVISION.

The Third Circuit's failure to apply fundamental principles of statutory construction in interpreting the DPPA's remedies provisions led to its erroneous conclusion that a court may award the greater of actual damages *or* $2,500, even if the plaintiff has not adduced any evidence of actual damages. Plaintiffs' response defends the lower courts' interpretation of the remedies provision on grounds that do not withstand scrutiny.

First, plaintiffs argue that the meaning of the statute is changed by the dash that punctuates Section 2724(b). Clearly, the dash after "may award" merely introduces the list of remedies available under the DPPA.

Plaintiffs' contentions regarding the meaning of "liquidated damages" similarly miss the mark. As explained in UNITE's petition, Congress's inclusion of the term "liquidated damages" supports the interpretation that a plaintiff must demonstrate actual damages to recover any compensatory award because liquidated damages are not awarded at common law if no harm occurs, and Congress is presumed to have meant for a statutory term to be interpreted pursuant to its common-law meaning. (Pet. at 30-31). Plaintiffs do not dispute that the cases (and Restatement sections) cited by UNITE hold that where a plaintiff suffers no injury, the court cannot award liquidated damages.

Moreover, *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148, 153-54 (1956) (Opposition at 23), supports UNITE's position because this Court specifically found it was "obvious that injury to the [plaintiff] resulted," even though the damages were "difficult or impossible to ascertain."

Finally, plaintiffs' contention that "the invasion of privacy is itself an injury, for which victims are entitled to be compensated, without regard to any physical or economic injury" is belied by this Court's decision in *Doe v. Chao*, 540 U.S. 614, 620 (2004), holding that a plaintiff with no actual damages could not recover a minimum damage award of $1,000 under the Privacy Act, 5 U.S.C. § 552a. Despite previously noting that "*dictum* does not constitute legal 'authority'" (Opposition at 14), plaintiffs rely on *dicta* from *Doe v. Chao* which they contend demonstrates why its holding is inapplicable precedent. However, the absence of "person entitled to recovery" in the DPPA does not mandate different interpretations of the DPPA and the Privacy Act. In fact, as discussed above, the reference to "liquidated damages" in the DPPA has the same functional effect as "person entitled to recovery" in the Privacy Act in that both preclude recovery when the statutory violation caused no harm or injury. Moreover, if there are "critical" differences between the Privacy Act and the DPPA which make the holding of *Doe v. Chao* somehow inapplicable to the DPPA, that is all the more reason to grant this petition.

D. THIS PETITION IS RIPE FOR SUPREME COURT REVIEW.

Plaintiffs' final contention is that review of this matter is premature because

> the judgment being appealed from totals only $22,500. Moreover, the liability to the entire class has not yet been determined, so it would be premature to grant certiorari based on concern over the size of an award that has not been made.

(Opposition at 30). However, the district court has certified a class of 1,758 to 2,005 persons. Absent this Court's intervention, each class member will likely receive at least $2,500 in liquidated damages and possibly more if any plaintiffs are awarded multiple liquidated damages awards. Furthermore, the National Right to Work Foundation is seeking access to roughly 12,000 names allegedly accessed by UNITE to advise them that their rights have been violated. *See Pichler v. UNITE*, No. 04-2841 (E.D. Pa. Apr. 15, 2008) (Dkt. 257), *appeal pending*, No. 08-2354 (3d Cir.). Should Right to Work prevail on its appeal, the amount at issue could reach $30,000,000 or more. Far from the $22,500 plaintiffs contend is at issue, this is exactly the "enormous potential liability, which turns on a question of federal statutory interpretation" that Justices Scalia and Alito noted "is a strong factor in deciding whether to grant certiorari" in considering another DPPA petition for certiorari. *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006).

Moreover, unlike the *Kehoe* petition, which was premature because the district court had not resolved whether there was a knowing violation, here both lower courts have addressed all the liability issues and the Third Circuit's remand is limited to a determination of whether multiple or punitive damages should be awarded. Thus, this petition presents the opportunity for this Court to address the issues that were premature in the *Kehoe* petition.

CONCLUSION

For the foregoing reasons, UNITE respectfully urges the Court to grant this petition for a writ of certiorari.

Respectfully submitted,

LAWRENCE T. HOYLE, JR.
Counsel of Record
ARLENE FICKLER
ARLEIGH P. HELFER III
JOHN R. TIMMER
HOYLE, FICKLER, HERSCHEL
& MATHES LLP
One South Broad Street
Suite 1500
Philadelphia, PA 19107
(215) 981-5700

Attorneys for Petitioner
UNITE